Supreme Court, U. S.
FILED
MAY 10 1977
MICHAEL RODAK, JR., CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

76-1572

UNITED STATES OF AMERICA, PETITIONER

v.

TED R. GRAYSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
PAUL J. BRYSH,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Reasons for granting the petition	6
Conclusion	10
Appendix A	1a
Appendix B	32a
Appendix C	34a
Appendix D	35a

CITATIONS

Cases:

Dorszynski v. *United States*, 418 U.S. 424	6
Hess v. *United States*, 496 F.2d 936	8
Humes v. *United States*, 186 F.2d 875	8
McGautha v. *California*, 402 U.S. 183	9
Poteet v. *Fauver*, 517 F.2d 393	3, 4, 5
Scott v. *United States*, 419 F.2d 264	8
United States v. *Atkins*, 480 F.2d 1223	7
United States v. *Cardi*, 519 F.2d 309	7
United States v. *Cluchette*, 465 F.2d 749	8
United States v. *Doyle*, 348 F.2d 715, certiorari denied, 382 U.S. 843	7
United States v. *Hendrix*, 505 F.2d 1233, certiorari denied, 423 U.S. 897	7, 8
United States v. *Levine*, 372 F.2d 70, certiorari denied, 388 U.S. 916	8

Cases—Continued	Page
United States v. *Marines*, 535 F.2d 552	7
United States v. *Metz*, 470 F.2d 1140, certiorari denied *sub nom. Davenport* v. *United States*, 411 U.S. 919	7
United States v. *Moore*, 484 F.2d 1284	8
United States v. *Nunn*, 525 F.2d 958	8
United States v. *Sweig*, 454 F.2d 181	7
United States v. *Wallace*, 418 F.2d 876, certiorari denied, 397 U.S. 955	8
Williams v. *New York*, 337 U.S. 241	6, 7
Statutes and rule:	
18 U.S.C. 751(a)	2
18 U.S.C. 3577	6
21 U.S.C. 841(a)(1)	2
Fed. R. Crim. P. 32(c)(2)	6

In the Supreme Court of the United States

OCTOBER TERM, 1976

No.

UNITED STATES OF AMERICA, PETITIONER

v.

TED R. GRAYSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The original judgment order of the panel (App. D, *infra*, 35a-36a) is not reported. The opinion of the panel on rehearing (App. A, *infra*, 1a-31a) is reported at 550 F.2d 103.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 32a-33a) was entered on January 7, 1977. A

timely petition for rehearing with a suggestion for rehearing *en banc* was denied on March 17, 1977 (App. C, *infra*, 34a). On April 7, 1977, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including May 16, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a trial judge, in setting sentence for a convicted defendant, may take into account his belief that the defendant lied at trial.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Pennsylvania, respondent was convicted of prison escape in violation of 18 U.S.C. 751(a). He was sentenced on March 12, 1976, to two years' imprisonment, to be served consecutively to the three-year term of imprisonment that he was serving on a prior narcotics conviction.

1. On October 11, 1975, respondent escaped from the Allenwood Federal Prison Camp, where he had been serving his sentence after conviction for distributing a controlled substance in violation of 21 U.S.C. 841(a)(1). Two days later, respondent was apprehended in New York City. At trial respondent took the witness stand and testified that he had left Allenwood because other inmates, to whom he owed

money, had threatened his life (App. A, *infra*, 3a).

When imposing sentence following respondent's conviction, the trial judge stated that he would "give [his] reasons for sentencing in this case with clarity, because one of the reasons may well be considered by a Court of Appeals to be impermissible * * *" (App. A, *infra*, 4a). The judge then expressed his belief that respondent had perjured himself at trial, stating (App. A, *infra*, 5a):

> In my view a prison sentence is indicated, and the sentence that the Court is going to impose is to deter you, Mr. Grayson, and others who are similarly situated. Secondly, it is my view that your defense was a complete fabrication without the slightest merit whatsoever. I feel it is proper for me to consider that fact in the sentencing, and I will do so.

2. On appeal respondent contended, *inter alia*, that the trial judge had impermissibly relied at sentencing on his belief that respondent lied at trial. The court of appeals initially affirmed (App. D, *infra*, 35a-36a), but after respondent filed a petition for rehearing arguing that rejection of his contention was inconsistent with *Poteet* v. *Fauver*, 517 F.2d 393 (C.A. 3),[1] the case was reheard and a divided panel

---

[1] *Poteet* involved a collateral attack on a bank robbery sentence imposed by a New Jersey court. At sentencing, the trial judge had attempted to extract confessions from Poteet and his co-defendant Borowski. Borowski admitted his participation in the robbery and was sentenced to five years' imprisonment. Poteet refused to confess and for that reason

of the court of appeals vacated respondent's sentence and remanded for resentencing (App. B, *infra*, 32a-33a).[1]

In a separate opinion announcing the judgment of the court, Judge Garth stated his view that the *Poteet* case was controlling. While Judge Garth recognized that *Poteet* involved a significantly different factual setting,[2] he nonetheless concluded that *Poteet* stood for the general principle, applicable here, that "'the sentencing judge may not add a penalty because he believes that the defendant lied'" (App. A, *infra*, 8a). Judge Adams, concurring in the judgment, agreed that the "language and holding" of *Poteet* "inveigh against the practice of augmenting

---

was sentenced to a prison term of 14 to 16 years. The Third Circuit reversed the order of the district court denying relief and directed that Poteet be resentenced.

[1] The government thereupon filed a petition for rehearing with a suggestion of rehearing *en banc*, which was denied, two judges dissenting (App. C, *infra*, 34a).

On April 26, 1977, the court of appeals recalled its mandate and stayed its reissuance for thirty days. The court further stated: "If during such period the United States files with the Supreme Court of the United States a petition for a writ of certiorari, the stay of the reissuance of the mandate shall continue until disposition of the proceedings in the Supreme Court."

[2] Judge Garth noted that in *Poteet* "the State trial judge was unsuccessful in his attempt to force Poteet to admit his guilt after the verdict and after a co-defendant had been forced to 'confess'" and "added ten years to Poteet's sentence because of his failure to 'confess' (App. A, *infra*, 7a).

a sentence on account of a trial judge's belief that a defendant uttered false testimony" (App. A, *infra*, 15a), but he added (*id.* at 15a-16a):

> Even if it were to be concluded that *Poteet* does not control the present case, I would have serious misgivings about the propriety of the sentencing procedure employed by the trial judge here. * * * If a trial judge increases a sentence because he is of the belief that a defendant's testimony is untruthful, such an action could be interpreted as penalizing the defendant for exercising his constitutional right to take the stand. In addition, this practice could have the impermissible effect of deterring future defendants from testifying in their own behalf. Also, the defendant is, in effect, being punished for perjury, a separate offense that can be the subject of a criminal prosecution.

Judge Rosenn, dissenting, distinguished *Poteet* from the present case (App. A, *infra*, 19a) on the ground that "[t]he sentencing judge emphasized that he was not concerned with Poteet's false testimony on the stand but with Poteet's refusal to confess *after* the jury had returned its verdict against him" (emphasis in original). He also rejected the constitutional arguments made by Judge Adams, stating (App. A, *infra*, 22a): "[The sentencing judge] was not imposing any sentence for any independent crime; he was merely considering the behavior and character of the defendant as he saw the defendant and heard the evidence during the trial in his imposition of

sentence for the underlying crime" (footnote omitted). Judge Rosenn therefore concluded (App. A, *infra*, 30a):

> The exclusion from the scope of the [sentencing] judge's inquiry of visible and clear conduct of the defendant in the presence of the judge during trial needlessly limits the judicial process in dispensing justice and adds little to the due process interests of the defendant.[*]

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals—holding that a sentencing judge may not consider his belief that the defendant lied at trial—is a departure from the principles established by this Court in *Williams* v. *New York*, 337 U.S. 241, and is in conflict with the decisions of eight other courts of appeals. Since there are thousands of cases occurring each year in which a testifying defendant is convicted, it is important that sentencing judges know whether they may take into account in imposing sentence a belief that the defendant gave false testimony during the trial.

1. A trial judge has broad latitude in imposing sentence (see, *e.g.*, *Dorszynski* v. *United States*, 418 U.S. 424, 440-441) and typically may consider a wide

[*] Judge Rosenn did suggest two limitations (App. A, *infra*, 30a-31a): that the sentencing judge should be "convinced beyond a reasonable doubt that the defendant intentionally lied on material issues of fact" and that "the falsity of the defendant's testimony be necessarily established by the finding of guilt."

range of information concerning a convicted defendant (see 18 U.S.C. 3577; Fed. R. Crim. P. 32(c)(2)). "[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Williams* v. *New York*, *supra*, 337 U.S. at 246. "Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics" (*id.* at 247; footnote omitted).

Relying on these principles, this Court in *Williams*, *supra*, upheld against constitutional attack the consideration by a sentencing judge of prior criminal acts for which the defendant had not been convicted. Following *Williams*, the courts of appeals have permitted consideration by sentencing courts of pending or dismissed charges (*United States* v. *Marines*, 535 F.2d 552, 554-555 (C.A. 10); *United States* v. *Metz*, 470 F.2d 1140, 1141-1142 (C.A. 3), certiorari denied *sub nom. Davenport* v. *United States*, 411 U.S. 919; *United States* v. *Doyle*, 348 F.2d 715, 721 (C.A. 2), certiorari denied, 382 U.S. 843)), charges of which the defendant has been acquitted (*United States* v. *Cardi*, 519 F.2d 309, 314 n. 3 (C.A. 7); *United States* v. *Sweig*, 454 F.2d 181, 184 (C.A. 2)), and convictions that have been reversed on ap-

peal (*United States* v. *Atkins*, 480 F.2d 1223, 1224 (C.A. 9)). Underlying these decisions is a recognition that the sentencing judge must be free to consider all pertinent information if he is to make "the punishment • • • fit the offender and not merely the crime" (*Williams* v. *New York*, *supra*, 337 U.S. at 247).

There appears to be little basis for permitting a sentencing judge to consider material contained in a presentence report or other extrajudicial documents but prohibiting him from relying upon his direct observations at trial. The defendant's behavior at trial often will be more probative of his character at the time of sentencing because it will have occurred more recently than out-of-court criminal activity. As Judge Frankel, writing in *United States* v. *Hendrix*, 505 F.2d 1233, 1236 (C.A. 2), certiorari denied, 423 U.S. 897, has observed: "[A] fact like the defendant's readiness to lie under oath before the judge who will sentence him would seem to be among the more precise and concrete of the available indicia [of his character]." Moreover, because the sentencing judge is not relying upon hearsay reports and the observations of other persons, there is less concern about the factual accuracy of this particular predicate for imposition of sentence.

2. The decision below is contrary to the decisions of eight other courts of appeals, which hold that a sentencing judge may consider the defendant's commission of perjury at trial. See *United States* v.

Nunn, 525 F.2d 958 (C.A. 5); *United States* v. *Hendrix*, 505 F.2d 1233 (C.A. 2), certiorari denied, 423 U.S. 897; *Hess* v. *United States*, 496 F.2d 936, 939 (C.A. 8); *United States* v. *Moore*, 484 F.2d 1284, 1287 (C.A. 4); *United States* v. *Cluchette*, 465 F.2d 749, 754-755 (C.A. 9); *United States* v. *Wallace*, 418 F.2d 876, 878 (C.A. 6), certiorari denied, 397 U.S. 955; *United States* v. *Levine*, 372 F.2d 70, 74 (C.A. 7), certiorari denied, 388 U.S. 916; *Humes* v. *United States*, 186 F.2d 875 (C.A. 10).[5]

In *Nunn*, *Hendrix*, *Moore*, and *Levine* the courts expressly rejected the argument that reliance on the defendant's false testimony in determining sentence amounts to punishment for perjury without a conviction for that crime. In *Hendrix*, *supra*, the court also rejected the argument that a defendant might be deterred from testifying in his own behalf by the possibility that the trial judge might disbelieve him and increase his sentence, a conclusion in accord with *McGautha* v. *California*, 402 U.S. 183, 213-220. The court in *Hendrix* found that this danger did not warrant a ban against consideration of a defendant's perjury, suggesting "as a matter of unscientific observation and introspection • • • that trial judges generally are (or become) sophisticated and experienced enough to know that the convicted defendant who

---

[5] The District of Columbia Circuit alone is in accord with the Third Circuit's decision in the instant case. See *Scott* v. *United States*, 419 F.2d 264, 268-269 (C.A.D.C.).

took the stand is not *ipso facto* a perjurer" (505 F.2d at 1236).[6]

Whichever may be the correct view of the law, we submit that the issue is of substantial importance to the administration of criminal justice and that this Court should undertake to resolve the conflict among the circuits.

[6] "[T]o encourage a measured approach to the subject," the Second Circuit adopted a rule, to be applied wholly prospectively, "that in the future perjury should not be treated as an adverse sentencing factor unless the judge is persuaded beyond a reasonable doubt that the defendant committed it" (505 F.2d at 1236). The opinion does not make clear whether the court adopted this rule on supervisory or constitutional grounds. Judge Rosenn, in dissent below, suggests that a variation of that rule would provide appropriate protection for a defendant hesitant to testify at trial. See note 4, *supra*. We question whether any such restriction is appropriate or consistent with the standards applied in connection with other factors considered in sentencing, but it is in any event clear that the limitations on consideration of a defendant's perjury suggested by these judges are satisfied on the facts of the present case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
PAUL J. BRYSH,
Attorneys.

MAY 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 76-1646

UNITED STATES OF AMERICA

v.

TED R. GRAYSON, APPELLANT

On Appeal from the United States District Court
for the Middle District of Pennsylvania

Crim. No. 75-221

Submitted under Third Circuit Rule 12(6)
September 9, 1976

Before: ADAMS, ROSENN, and GARTH, *Circuit Judges*

Decided September 16, 1976

Judgment Vacated and Petition for Panel Rehearing
Granted October 15, 1976

Submitted for Rehearing under Third Circuit
Rule 12(6) Oct. 15, 1976

OPINION SUR PANEL REHEARING

Filed Jan. 7, 1977

S. John Cottone, Esq.
United States Attorney
Scranton, Pennsylvania 18501

Harry A. Nagle, Esq.
Assistant United States Attorney
Lewisburg, Pennsylvania 17837

Attorneys for appellee

John M. Humphrey, Esq.
23 West Third Street
Williamsport, Pennsylvania 17701

Attorney for appellant

GARTH, *Circuit Judge*

On October 11, 1975, the appellant, Ted R. Grayson, without authority left the Allenwood Federal Prison camp, where he had been serving a three-year sentence for a controlled substances conviction. Two days later, he was apprehended in New York City.

Indicted for this escape pursuant to 18 U.S.C. § 751(a),[1] Grayson was tried before a jury in the United States District Court for the Middle District of Pennsylvania. His sole defense was duress—that he had been forced to flee from Allenwood because of threats on his life made by inmates to whom he owed gambling debts. The jury, evidently disbelieving Grayson, rejected this defense and found Grayson guilty.

---

[1] Section 751(a) provides:

§ 751. Prisoners in custody of institution or officer

(a) Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both; or if the custody or confinement is for extradition or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined not more than $1,000 or imprisoned not more than one year, or both.

The district court sentenced Grayson to a two-year term of imprisonment which was to commence at the conclusion of the sentence that he was then serving. Prior to the actual sentencing, the district court had expressed its belief that Grayson had lied while testifying at trial.[2] Thereafter, in imposing sentence the court quite properly noted that it could, without giving any explanation, sentence Grayson to the maximum term of imprisonment provided by the statute, that is, a five-year prison term, *see* note 1 *supra*. *See Dorszynski* v. *United States*, 418 U.S. 424, 431 (1974); *Gore* v. *United States*, 357 U.S. 386, 393 (1958); *Government of the Virgin Islands* v. *Richardson*, 498 F.2d 892, 894 (3d Cir. 1974). Nevertheless, the district court proceeded to identify those factors which it had considered in arriving at the two-year sentence and expressly invited appellate review of its action. The district court's comments were as follows:

> "THE COURT: All right. I'm going to give my reasons for sentencing in this case with clarity, because one of the reasons may well be considered by a Court of Appeals to be impermissible; and although I could come into this Court Room and sentence this Defendant to a five-year prison term without any explanation at all; I think it is fair that I give the reasons so that if the Court of Appeals feels that one of the reasons which I am about to enunciate is an improper consideration for a trial judge, then the Court will be in a position to reverse this Court and send the case back for re-sentencing.
>
> In my view a prison sentence is indicated, and the sentence that the Court is going to impose is to deter you, Mr. Grayson, and others who are similarly situated. Secondly it is my view that your defense was a complete fabrication without the slightest merit whatsoever. I feel it is proper for me to consider that fact in the sentencing, and I will do so."

App. at 40.

Grayson advanced three contentions in his direct appeal to this Court, the first two of which we have found to be without merit.[3] Only his final argument concerns us here. Grayson argues that the district court judge erred by imposing a sentence "the severity of which was based in part upon the judge's belief that the defendant had committed perjury during the trial." Disagreeing with that claim and satisfied that Grayson's other two contentions should be rejected, we affirmed the judgment of the district court by a judgment order dated September 16, 1976.

Thereafter, Grayson filed a petition for rehearing. The thrust of the petition was that we had failed to

---

[2] In its order of April 30, 1976 denying Grayson's motion for a new trial, the court had stated: "Grayson's story was a total fabrication and had no semblance of plausibility." App. at 47.

[3] Grayson's first contention was that the district court had erred in failing to ask his voir dire question "Would you be more likely to find the defendant guilty merely because he has previously been convicted of a crime?" His second claim was that the court had erred in permitting the introduction of evidence of his prior convictions for the purpose of impeaching his credibility.

follow a prior precedent in this Circuit, *Poteet* v. *Fauver*, 517 F.2d 393 (3d Cir. 1975). In *Poteet*, this Court had adopted the following principle of law:

> A defendant has a right to defend, and although he is not privileged to commit perjury in that defense, the sentencing judge may not add a penalty because he believes the defendant lied. One reason is evident. A man may not be punished except upon a charge and opportunity for hearing. There having been no charge of perjury or conviction for that crime, due process would be denied if further punishment were inflicted for that crime. Another reason, apart from this procedural obstacle, is that the right to defend would be unduly burdened if a defendant understood that, if convicted, his mere denial of the charge under oath would without more lead to succesive convictions for perjury until he or the State was exhausted.

517 F.2d at 395, *quoting State* v. *Poteet*, 61 N.J. 492, 495-96, 295 A.2d 857, 858 (1972).

Upon reviewing the petition for rehearing, we, rather than the Court in banc,[*] reconsidered our

---

[*] This Court's Internal Operating Procedure 0.2. reads as follows:

> O. In Banc Hearing or Rehearing
>
> 1. . . .
>
> 2. *Rehearing In Banc after Decision.* Where a petition for rehearing before the panel or in banc has been filed by a party as provided by F.R.A.P. 35(b) or 40(a), unless the petition for panel rehearing under 40(a) states explicitly it does not request in banc rehearing under 35(b), it is presumed that each rehearing petition requests both panel rehearing and rehearing in banc.
>
> a. *Panel Rehearing.* Each member of the panel concurring in the majority has the right to require rehearing before the panel. Thus, a senior judge of this Court or a justice or a visiting circuit or district judge sitting by designation who was a concurring member of the panel has the right to require rehearing before the panel.

See also Notes on F.R.App.P. 35, Advisory Committee on Appellate Rules; Third Circuit IOP 0.3.b.

prior determination and vacated the judgment order. We conclude that the controlling law in this Circuit on this question is found in *Poteet* v. *Fauver*, *supra*.

I.

Our initial examination of *Poteet* when it was cited as grounds for reversal in Grayson's brief on appeal had persuaded us that *Poteet* did not control the disposition of this issue. *Poteet*, which accepted the legal doctrines formulated by the New Jersey Supreme Court but held that they had been applied incorrectly, presented much more egregious circumstances than are found here. In *Poteet*, the State trial judge was unsuccessful in his attempt to force Poteet to admit his guilt after the verdict and after a co-defendant had been forced to "confess." The trial judge then added ten years to Poteet's sentence because of his failure to "confess." This factual setting differs dramatically from that which confronted the district court judge in Grayson's case. Despite our initial belief that *Poteet* did not appear to control the

result in *Grayson* because of its different factual setting, nevertheless when we reexamined *Poteet* we could not fairly deny that this Circuit had committed itself to the principle quoted above, *i.e.*, that "the sentencing judge may not add a penalty because he believes that the defendant lied."

The reading given *Poteet* by the dissent is substantially different than our reading. The dissent claims that

> [t]he sentencing judge in *Poteet* . . . would have effectively required the defendant to waive his Fifth Amendment rights. Although certain language in *Poteet* suggests that a sentencing judge may not add an increment to a sentence in the belief that the defendant lied under oath on the witness stand, no such situation was presented in *Poteet*. I must therefore conclude that it was the trial judge's disregard of Poteet's Fifth Amendment rights which animated this Court in that case.

Dissenting Op. at 2. Additionally, the dissent reads *Poteet* as pertaining only to post-verdict conduct as opposed to perjury committed at any time during trial. *Id.* at 3. Neither the text of *Poteet* nor the inarticulated premises of *Poteet* support such a strained reading.

Nowhere in the *Poteet* opinion does the Court address the Fifth Amendment concern which Judge Rosenn in dissent would regard as the basis for the *Poteet* court's holding. It impresses us that when the author of *Poteet* (Judge Aldisert) desired to confront Fifth Amendment considerations in the sentencing

process in *United States* v. *Garcia*, —— F.2d ——, Nos. 75-1759 and 75-1760 (3d Cir., November 5, 1976), he did not disguise his intent or leave it to implication. Rather, his discussion of Fifth Amendment considerations leading to the Court's holding in *Garcia* was explicit, undisguised and unequivocal.[**]

We are certain that had the Fifth Amendment considerations attributed to the *Poteet* court by Judge Rosenn actually been involved in Poteet, the same ex-

---

[**] In *Garcia*, *Poteet* is distinguished, the Court stating:

> "No suggestion is made here that the court included in the sentences an increment for an offense other than that to which Antonmarchi and Garcia pleaded guilty."

United States v. Garcia, *supra*, Slip Op. at 5.

Garcia involved a plea agreement under which the defendants pleaded guilty to one count of possession with intent to distribute cocaine. The district court refused to extend lenity in its sentence, because the defendants had refused to assist in investigations of illicit narcotics traffic. In vacating the sentences and remanding for resentencing, this Court recognized the Fifth Amendment problem by stating:

> "In order to obtain lenity on a sentence for a guilty plea in which each had admitted guilt to a narrow compass of facts, then, appellants were in effect coerced to furnish the prosecutor with factual information of a broader and potentially unlimited factual scope. And they were required to disgorge this information without any assurance of immunity from future federal or state prosecutions resulting from the information supplied by them."

Id. at 7-8. Whereas the defendants in *Garcia* ran the risk of additional prosecution as a consequence of divulging the information sought by the district court, in *Poteet* there was no such risk, for the trial court in *Poteet* sought only Poteet's confirmation of the *very activity* for which he was convicted.

plicit, undisguised, and unequivocal analysis found in *United States* v. *Garcia*, *supra*, would have been set forth in *Poteet*. Hence we cannot agree that the governing principle of *Poteet* and its result were the product of this Court's Fifth Amendment concerns. Nor can we agree, in interpreting *Poteet*, that what we consider to be its controlling principle, is "by definition, only dictum." *See* Dissenting Op. at 3.

Poteet prohibits a trial judge from increasing a defendant's sentence because the judge is convinced that the defendant has lied while before him. Although the colloquy between the judge and the defendant that took place in *Poteet* occurred during sentencing, it resulted from Poteet's defense at trial, on which the sentencing judge focused.

The state sentencing judge, prior to sentencing Poteet, referred to Poteet's trial defense as "an outrage" and to Poteet as "a liar," 517 F.2d at 395:

> When [Poteet] tells me he wasn't there, he's a liar, right? I'm listening. You heard him. He said he didn't do it. The jury made a mistake. Didn't you hear him, didn't you?

The entire basis for the state judge's remarks at sentencing was the testimony given at trial that Poteet, although found in the getaway car, persistently claimed that he was "a hitch-hiker to whom the co-defendants had happened to give a ride." 517 F.2d at 394. It was this "hitchhiker" versus "robber" status that was discussed at length during the state sentencing procedure. Hence, we cannot consider as

dictum this Court's holding in *Poteet* v. *Fauver*, which was summarized by Judge Aldisert, the author of that opinion, as:

> Considering the totality of the sentencing judge's comments to Borowski and Poteet, we are not convinced that an increment of prison time was not added to Poteet's sentence because he persisted in maintaining his innocence after the jury had returned a guilty verdict. We conclude that this contravened fundamental principles so ably and accurately capsulated by Chief Justice Weintraub:
>
> > There having been no charge of perjury or conviction for that crime, due process would be denied if further punishment were inflicted for that crime.
>
> *Id.* at 398, quoting 61 N.J. at 495-96, 295 A.2d at 858.

In view of that holding, and despite any other sentencing concepts to which we might otherwise be attracted, we are controlled here by the principles announced in, and the holding of, the *Poteet* decision.

We are aware of differing views as to what might, or might not, constitute appropriate considerations and standards for sentencing in this context, *see*, *e.g.*, *United States* v. *Nunn*, 525 F.2d 958, 960-61 (5th Cir. 1976); *United States* v. *Hendrix*, 505 F.2d 1233, 1234-37 (2d Cir. 1974), *cert. denied*, 423 U.S. 897 (1975); *Commonwealth* v. *Murray*, —— Mass. App. Ct. ——, 19 Cr.L.Rep. 2480 (July 26, 1976). *See also* the opinions of Judge Adams, concurring, and

Judge Rosenn, dissenting, *infra*.[4b] Until such time, however, as this Court in banc has renounced the doctrine of *Poteet*, we, as a panel of this Court, are bound to give it effect.[5] So, too, is the district court.

II.

It is no answer to interpret the comment of the district court judge who sentenced Grayson as a wholly gratuitous observation. To us, it is obvious that the district court judge intended to, and did, add an increment to the sentence he might otherwise have imposed on Grayson.

The district court judge had commendably recognized that articulating the basis for his sentence might very well implicate *Poteet* and the principles established therein. It was for that reason that he invited this Court to focus its attention on the reason for

[4b] As the author of this majority opinion, I believe that the only questions before us are (1) whether or not *Poteet* proscribes an enhanced sentence for lying and, if it does, (2) whether we must follow our earlier decision in that case. Having answered both of these questions affirmatively, I find no need to address the overall reach of sentencing considerations which my brothers, Judges Adams and Rosenn, discuss. Inasmuch as I regard this panel as bound by *Poteet*, I resist the temptation of joining their discussion.

[5] Third Circuit Internal Operating Procedure M. 2. reads as follows:

> 2. *Avoiding Intra-Circuit Conflict.* It is the tradition of this Court that internal stability of its panel decisions be preserved. To avoid conflicts in panel decisions no subsequent panel may overrule a published opinion of a previous panel. Court in banc consideration is required to overrule a previous decision of this Court.

the sentence imposed. He fairly stated that he could have imposed the maximum prison term without any explanation. Such is the law in this Circuit. *See United States* v. *Lee*, 532 F.2d 911, 916 (3d Cir. 1976), *Government of the Virgin Islands* v. *Richardson*, *supra*. He also observed that his reason for imposing the sentence might be deemed to be improper, and if that were the case then this Court would be in a position to reverse his judgment. Finally, he stated: "It is my view that your [Grayson's] defense was a complete fabrication without the slightest merit whatsoever. I feel it is proper for me to consider that fact in the sentencing and I will do so." App. at 40.

As we have previously stated, *Poteet* mandates that no additional penalty may be imposed upon a defendant because the trial judge believes that the defendant lied while testifying. Here, Grayson's sentence was unquestionably increased for just this reason. His sentence, therefore, cannot stand.[6]

III.

We will reverse and remand to the district court with directions that Grayson's sentence be vacated and that he be resentenced by the district court without

[6] We emphasize the narrowness of our holding, which is limited to the one situation where, in sentencing, the district court judge is of the opinion that the defendant lied while testifying. We express no opinion as to any other considerations that may be relevant to, and appropriate in, sentencing.

consideration of his alleged false testimony given at trial.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Leonard I. Garth
Circuit Judge

ADAMS, *Circuit Judge*, concurring.

I concur in the result reached by Judge Garth, but because of the nature of the problem presented by this appeal consider it appropriate to add the following brief observations.

Although, as Judge Rosenn notes, *Poteet* v. *Fauver* [1] arose out of a factual configuration markedly different from the one now before us, I am persuaded that its language and holding inveigh against the practice of augmenting a sentence on account of a trial judge's belief that a defendant uttered false testimony.

Even if it were to be concluded that *Poteet* does not control the present case, I would have serious misgivings about the propriety of the sentencing procedure employed by the trial judge here. Such a practice, in my opinion, raises substantial constitutional questions in that it arguably trenches upon a defendant's constitutional privilege to testify in his own behalf [2] as well as his right to have criminal charges adjudicated pursuant to procedures required by due process. If a trial judge increases a sentence because he is of the belief that a defendant's testimony is untruthful, such an action could be interpreted as penalizing the defendant for exercising his constitutional right to take the stand. In addition, this practice could have the impermissible effect of deter-

---

[1] 517 F.2d 393 (3d Cir. 1975).

[2] *Cf* United States v. Jackson, 390 U.S. 570 (1970); Griffin v. California, 380 U.S. 360 (1969); United States *ex rel.* Macon v. Yeager, 476 F.2d 613 (3d Cir. 1973).

ing future defendants from testifying in their own behalf. Also, the defendant is, in effect, being punished for perjury, a separate offense that can be the subject of a criminal prosecution.

Judge Rosenn's dissent maintains that any constitutional challenges to the sentencing procedure under attack here have been foreclosed by the opinions of the Supreme Court in *Williams* v. *New York*[3] and of this Court in *United States* v. *Metz*.[4] I respectfully cannot agree. Neither *Williams* nor *Metz* dealt with the specific problems that now confronts us. The facts of those cases did not present the two constitutional infirmities that are arguably inherent in the sentence augmentation procedure at issue in this appeal. Nor do I find that the language of those opinions precludes a full consideration of these constitutional questions. Finally, it should be borne in mind that *Williams* antedated much of the evolving jurisprudence concerning the constitutional rights of the accused. Given this fact, I believe that we should be cautious about construing *Williams* in an expansive manner so as to govern the quite different problems presented in this case.

In suggesting that the sentencing practice employed by the trial court is possibly constitutionally flawed, I acknowledge that a clear majority of courts of appeals have approved such sentence augmenta-

---

[3] 337 U.S. 241 (1949).

[4] 470 F.2d 1140 (3d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973).

tion.[5] Unlike Judge Rosenn, however, I do not believe that these citations can be considered to be conclusive of the constitutional issues. First, some of these cases are factually distinguishable from the one at bar. More important, however, is the fact that the bulk of the opinions that sanction the practice simply do not address the constitutional considerations. And those which do advert to the existence of possible constitutional difficulties are devoid of systematic analysis of the constitutional problems.[6] In particular, I would note that Judge Frankel's opinion in *United States* v. *Hendrix*,[7] upon which Judge Rosenn places much reliance, does not deal with constitutional concerns.

The constitutional issues that we leave unresolved in this matter are, in my judgment, important ones that merit serious scrutiny. Hopefully, at the proper time, and in the proper case, they will receive definitive treatment.

---

[5] *See* United States v. Nunn, 525 F.2d 958 (5th Cir. 1976); United States v. Hendrix, 505 F.2d 1233 (2d Cir. 1974); Hess v. United States, 496 F.2d 936 (8th Cir. 1974); United States v. Moore, 484 F.2d 1284 (4th Cir. 1973); United States v. Cluchette, 465 F.2d 249 (9th Cir. 1972); United States v. Wallace, 418 F.2d 876 (6th Cir. 1969); Humes v. United States, 186 F.2d 875 (10th Cir. 1959). *But see* United States v. Moore, 484 F.2d 1284, 1288 (4th Cir. 1973) (Craven, J. concurring); Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969).

[6] *See, e.g.*, United States v. Wallace, 418 F.2d 876 (6th Cir. 1969).

[7] 505 F.2d 1233 (2d Cir. 1974).

ROSENN, *Circuit Judge*, Dissenting

I respectfully dissent. The convicted criminal usually regards the preparation of his defense and the ordeal of trial as unfortunate incidents of having been apprehended for the crime. Even after a jury has returned a verdict of guilty, the moment of truth for him often comes only when the sentence and judgment are imposed by the trial judge. The sentencing may also mark the commencement of the defendant's rehabilitation. The allocution of the judge at the time of sentencing, therefore, may be a critical point in providing the defendant with a realistic perspective and an opportunity, grim though it might be, to see himself as others see him. A candid articulation of the considerations which enter into the sentencing process should therefore be encouraged and should not be limited by the formal evidentiary constraints of the trial contest. Judge Garth, however, believes that in this case the judge violated the principle of *Poteet* v. *Fauver*, 517 F.2d 393 (3d Cir. 1975), when he considered as a sentencing factor the "complete fabrication" of the defense. Judge Adams believes that regardless of *Poteet*, the trial judge may have invaded the defendant's constitutional rights by augmenting the sentence on the substantive charge in the belief that the defendant lied while testifying. I am constrained to disagree with both propositions.

First, I do not believe that *Poteet* v. *Fauver*, *supra*, is applicable to the facts of this case. *Poteet* involved an effort by a state trial judge at sentencing to coerce

a confession from the defendant under the threat of imposing a longer sentence. A close reading of the case shows that it was for that reason this court was critical of the sentencing judge. The sentencing judge emphasized that he was not concerned with Poteet's false testimony on the stand but with Poteet's refusal to confess *after* the jury had rendered its verdict against him:

> It is one thing what you do before the jury. When you come here for sentence, . . . *that's the time for you to come clean*, if there's any hope of your ever coming clean. [Emphasis supplied.]

Poteet, *supra*, 517 F.2d at 393. The trial judge imposed a substantially lighter sentence on Poteet's equally mendacious co-defendant because he confessed his guilt when he appeared before the trial judge for sentencing. There is absolutely no indication that Poteet received a harsher sentence because he testified falsely. On the contrary, the evidence, including the lecture delivered to Poteet from the bench, discloses the judge's sole interest in extracting a confession of guilt from Poteet. Such an approach to the sentencing process "penalizes a defendant for preserving his right of appeal [and] it cannot be regarded as consistent with law . . . ." *Scott* v. *United States*, 419 F.2d 264, 282 (D.C. Cir. 1969) (Levinthal, J., concurring). The sentencing judge in *Poteet*, as in *Scott*, would have effectively required the defendant to waive his Fifth Amendment rights. Although certain language in *Poteet* suggests that a

sentencing judge may not add an increment to a sentence in the belief that the defendant lied under oath on the witness stand, no such situation was presented in *Poteet*. I must therefore conclude that it was the trial judge's disregard of Poteet's Fifth Amendment rights which animated this court in that case. The instant case, in contrast, presents no problem of coerced confession after trial and *Poteet* is therefore inapposite.

Judge Garth apparently recognizes that the focus of the trial court's concern in *Poteet* was the defendant's refusal after trial to admit his guilt, not his perjury during trial:

> In *Poteet*, the state trial judge was unsuccessful in his attempt to force Poteet to admit his guilt *after the verdict* and after a co-defendant had been forced to "confess."

Judge Garth's opinion at p. 4 (emphasis supplied). Nevertheless, Judge Garth cannot agree that the declaration in *Poteet* that "the sentencing judge may not add a penalty because he believes that the defendant lied" is mere dictum. Insofar as this language speaks to the problem of a defendant's lying on the witness stand, however, it is, by definition, only dictum, since that problem was not presented in *Poteet*. I fear that Judge Garth overlooks the critical words of the *Poteet* holding on which he himself relies:

> Considering the totality of the sentencing judge's comments to Borowski and Poteet, we

> are not convinced that an increment of prison time was not added to Poteet's sentence because he persisted in maintaining his innocence *after the jury had returned a guilty verdict.* [Emphasis supplied.]

Judge Garth reads the words "after the jury had returned a guilty verdict" to mean "while the defendant testified under oath." Although Judge Garth feels constrained by our Internal Operating Procedures to conform his decision to that dictum, I do not believe that our procedures require any such adherence.

As the majority agree, "the factual setting [in *Poteet*] differs dramatically from that which confronted the district court judge in Grayson's case." The trial judge in the instant case made no attempt to coerce Grayson into confessing, he merely recognized that Grayson's ready willingness to lie under oath during the trial indicated that Grayson also had a rehabilitation problem. *Poteet* therefore is not controlling.

The issue before us is not an effort by the trial judge to sentence the defendant for an independent crime for which he was not tried or to augment the sentence on the substantive charge. The basic question, as I view it, is whether it is impermissible for a judge, in evaluating the sentence he is about to impose for the underlying offense, to consider as an element his firm belief that the defendant's testimony was a "complete fabrication." In passing on the mendacious character of the defendant, the judge is not imposing his sentence on an independent offense. Con-

sideration of the characteristics of the defendant is pertinent since it offers the judge relevant information in the sentencing process.

Judge Adams believes that Judge Muir may have invaded the constitutional rights of the convicted defendant when he considered the defendant's fabrication of his defense as a factor in the sentence. However, as I have already indicated, Judge Muir was unequivocal. He was not imposing any sentence for any independent crime; he was merely considering the behavior and character of the defendant as he saw the defendant and heard the evidence during the trial in his imposition of sentence for the underlying crime.[1] Such consideration, when not abused, has been traditional in the courts and has been approved by Congress.

Congress has directed the utilization of presentence reports containing information about the defendants'

[1] Judge Muir stated during the allocution that he believed the prison sentence was indicated because (1) it would deter the defendant and "others similarly situated," and (2) it was his view that the defense was a "complete fabrication without the slightest merit whatsoever." It seems to me that these were not improper considerations in weighing whether the sentence for the underlying offense should or should not require imprisonment for the escape. They involve deterrence, the state's interest in discouraging falsity at trials, and a lesson in rehabilitation for the defendant. In imposing the sentence, Judge Muir carefully adhered to the admonition of the Advisory Committee on the Criminal Trial as stated in section 1.8. He did not impose "any sentence in excess of that which would be justified by any rehabilitative, protective deterrent, or other purposes of the criminal law because the defendant elected" to go to trial.

"characteristics." Fed. R. Crim. Pro., Rule 32. Congress has also expressly authorized federal courts to "receive and consider for the purpose of imposing an appropriate sentence" information concerning the background, character, and conduct of the convicted person.[2] As Judge Garth notes, no limitation is imposed by the statute on the information to be considered by the sentencing judge. The basis for this enactment as indicated in the legislative history, [1970] U.S. Code Cong. and Adm. News, p. 4007, 4040, is the decision in *Williams* v. *New York*, 337 U.S. 241 (1949), where the sentencing judge imposed a death sentence in the face of the jury's recommendation of life imprisonment.

In stating his reasons for fixing the sentence of death, the sentencing judge in *Williams* relied upon information in the presentence report and proceeded under the New York policy which encourages a judge in the exercise of his discretion to consider information about the convicted person's past life, health, habits, conduct, and mental and moral propensities. In rejecting the defendant's challenge that this policy denied him due process because it permitted consideration of information from persons whom the defendant had not been permitted to confront or cross-examine, the Supreme Court distinguished rules of evidence

[2] 18 U.S.C. § 3577 (1970) provides:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

"fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged" from information utilized in the sentencing process. The Court observed that historically courts in this country and in England have allowed a sentencing judge "wide discretion in the sources and types of evidence used by him in determining the kind and extent of punishment to be imposed. . . ." *Id.* at 247. The Court further noted that this approach has even greater relevance under "modern concepts individualizing punishment" and under the prevalent philosophy of penology "that the punishment should fit the offender and not merely the crime." *Id.* at 247.

In applying *Williams*, the Courts of Appeals of various circuits have time and again held that the sentencing judge is not limited to the consideration of facts proven during trial.[3] Consideration of prior criminal activity never passed on by a court has been expressly upheld by various circuits, sometimes against direct constitutional attack.[4] This Circuit, of

[3] *See, e.g.*, United States v. Haygood, 502 F.2d 166 (7th Cir. 1974), *cert. denied*, 419 U.S. 1114 (1975); United States v. Gordon, 495 F.2d 308 (7th Cir.), *cert. denied*, 419 U.S. 833 (1974); United States v. Allen, 494 F.2d 1216 (3d Cir.), *cert. denied*, 419 U.S. 852 (1974); United States v. Onesti, 411 F.2d 783 (7th Cir.), *cert. denied*, 396 U.S. 904 (1969).

[4] *See, e.g.*, Horowitz v. Henderson, 514 F.2d 740 (5th Cir. 1975); Houle v. United States, 493 F.2d 915 (5th Cir. 1974) (per curiam); United States v. Cifarelli, 401 F.2d 512 (2d Cir.) (per curiam), *cert. denied*, 393 U.S. 987 (1968); United States v. Weston, 448 F.2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972); United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970); United States v. Doyle, 348 F.2d 715 (2d Cir.) (Friendly, J.), *cert. denied*, 382 U.S. 843 (1965).

The scope of the sentencing judge's review has also been held to include criminal activity by the defendant subsequent to the trial of the crime for which he is being sentenced, United States v. Eberhardt, 417 F.2d 1009 (4th Cir. 1969), *cert. denied sub nom* Berrigan v. United States, 397 U.S. 909 (1970), facts underlying a separate charge then pending against the defendant, 507 F.2d 826 (7th Cir. 1974), *cert. denied*, 421 U.S. 949 (1975), and evidence admitted on counts of which the defendant was acquitted, United States v. Sweig, 454 F.2d 181 (2d Cir. 1972). The sentencing judge bears the responsibility for imposing a fair sentence which will serve the ends of punishment, deterrence, and rehabilitation, and the more he knows about the defendant's character the better. *See* United States v. Marcello, 423 F.2d 993 (5th Cir. 1970), *cert. denied*, 398 U.S. 959 (1970). Thus, the sentencing judge may even rely on illegally seized evidence which would have been excluded at trial because of Fourth Amendment violations, United States v. Schipani, 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971). *Cf.* Williams v. Oklahoma, 358 U.S. 576 (1969). Hearsay information may be considered also, even though it bears no relation to the crime for which the defendant is being sentenced. Gregg v. United States, 394 U.S. 489 (1969).

course, has given its express and wholehearted approval to consideration by a sentencing judge of pending indictments against the defendant. *United States* v. *Metz, Appeal of Davenport*, 470 F.2d 1140 (3d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973). As Judge Biggs wrote,

> The fact that other criminal activity has not been passed on by a court should not be controlling, for "of necessity, much information garnered by the probation officer will be hearsay

> and will doubtless be discounted accordingly, *but the very object of the process is scope.*"

Id. at 1142, quoting from Judge Friendly's opinion in *Doyle, supra.* [Emphasis supplied by Judge Biggs.]

If under *Williams, supra,* and the legion of cases which have followed it, hearsay evidence as to prior arrests, pending indictments, or indictments tried but not resulting in convictions, may be considered constitutionally in the selection of an appropriate sentence, it seems to me there is even greater justification for the judge to consider the attitude and conduct of the defendant during trial. In the instant case, the judge personally observed the witnesses and the demeanor of the defendant; he was impressed by the "complete fabrication" of the defense and its utter lack of merit. His observation specifically goes to the sort of person the defendant is; it is precise, is pertinent to the sentence the defendant should receive, and to the desirable objective of making the punishment fit the offender.[5]

The trial judge's weighing of the mendacious behavior of the defendant in the courtroom during trial is an appropriate exercise of his broad range of discretion on sentencing. It may be that the conduct described also amounts to perjury, but it seems to me to be less subject to due process attack than

[5] *Cf.* United States v. Biscoe, 518 F.2d 95 (1st Cir. 1975), holding that it was proper for the trial judge to interpret the defendant's extensive dramatic display of gestures and facial expressions during the trial as evidence that he had not repented and to sentence accordingly.

consideration of obvious hearsay in presentence reports. The constitutional question which Judge Adams raises was addressed and rejected in *United States* v. *Hendrix,* 505 F.2d 1233 (2d Cir. 1974), *cert. denied,* 423 U.S. 897 (1975),[6] in these words:

> The appellant urges in substance that to punish him by an enhanced sentence for perjury amounts to a kind of conviction for another crime without the safeguards of indictment and trial. But this ignores the nature of the sentencing process as it exists in our system and of the factors the trial judge may consider in exercising a frequently enormous range of discretion. If there is no clear consensus on these factors, it is certainly clear that they include, as aggravating circumstances, conduct that is not literally "criminal," or at least had not been duly adjudged criminal in the case in which sentence is being imposed.
>
> • • • •
>
> The effort to appraise "character" is, to be sure, a parlous one, and not necessarily an enterprise for which judges are notably equipped by prior training. Yet is is in our existing scheme of sentencing one clue to the rational exercise of discretion. If the notion of "repentance" is out of fashion today, the fact remains that a manipulative defiance of the law is not a cheerful datum for the prognosis a sentencing

[6] The opinion was authored by Judge Marvin Frankel of the Southern District of New York sitting by designation. Judge Frankel is a recognized authority on sentencing. *See* M. Frankel, *Criminal Sentences; Law Without Order* (1973).

> judge undertakes. [Citation] Impressions about the individual being sentenced—the likelihood that he will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, the degree to which he does or does not deem himself at war with his society—are, for better or worse, central factors to be appraised under our theory of "individualized" sentencing. The theory has its critics. While it lasts, however, a fact like the defendant's readiness to lie under oath before the judge who will sentence him would seem to be among the more precise and concrete of the available indicia.

Even in cases where defendant's mendacity has not risen to the level which moved Judge Muir in this case, all circuits except one [7] have rejected the contention that a judge in imposing sentence cannot properly consider the defendant's willingness to lie under oath.[8]

---

[7] *Compare* United States v. Hendrix, 505 F.2d 1233 (2d Cir. 1974), *cert. denied*, 423 U.S. 897 (1975); United States v. Moore, 484 F.2d 1284 (4th Cir. 1973); United States v. Nunn, 525 F.2d 958 (5th Cir. 1976), *rehearing denied*, 527 F.2d 1390 (1976); United States v. Wallace, 418 F.2d 876 (6th Cir. 1969), *cert. denied*, 397 U.S. 955 (1970); Hess v. United States, 496 F.2d 936 (8th Cir. 1974); United States v. Clauchette, 465 F.2d 749 (9th Cir. 1972); Humes v. United States, 186 F.2d 875 (10th Cir. 1951), with Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969).

[8] I also fear that a rule barring a sentencing judge from considering a defendant's obvious willingness to lie under oath will have a pernicious effect. A sentencing judge cannot help but be influenced by his conviction that the offender deliberately and flagrantly lied under oath during the trial. The majority's rule may have the effect of replacing the type of commendably frank and instructive explanation which Judge Muir delivered to the defendant in this case with an unconscious, unexpressed reliance on the very same factor. If the sentencing judge withholds his thoughts, any sentence within legal limits will withstand attack. A wooden and mechanical announcement of the sentence will replace an intelligent articulation of reasons. Judge Frankel succinctly stated the need for such articulation:

> The absence of any explanation or purported justification for the sentence is among the more familiar and understandable sources of bitterness among people in prison. Philosophers have agreed for ages on the ideal that the person suffering punishment should be guided to understand and, in the ultimate hope, realize the justice of the affliction. Our practice of terse dispositions is at the opposite pole.

M. Frankel, *supra* note 5, at 42-43. *See also* Gollaher v. United States, 419 F.2d 520, 530 (9th Cir. 1969), *cert. denied*, 396 U.S. 960 (1964).

In addition to *Hendrix*, *supra*, constitutional arguments were reviewed in *Hess* v. *United States*, 496 F. 2d 936 (8th Cir. 1974), and were explicitly raised by Judge Craven's concurring opinion in *United States* v. *Moore*, 484 F.2d 1284 (4th Cir. 1973), and implicitly rejected by the majority. Thus, the weight of decisional and statutory authority favors consideration by a sentencing judge of a wide variety of information which might serve to illuminate the character of the person being sentenced—hearsay evidence of past crimes, character evidence gathered in the presentence report, the allocution by the defendant at the time of sentencing, and the judge's impression of the defendant's character.

In selecting an appropriate sentence, of course, the judge should scrutinize the probative value of the evidence he considers and discount evidence which may be dubious. The exclusion from the scope of the judge's inquiry of visible and clear conduct of the defendant in the presence of the judge during trial needlessly limits the judicial process in dispensing justice and adds little to the due process interests of the defendant.

Judge Adams does not find the decisions of our sister circuits to be conclusive and I recognize, of course, that they do not bind us. We are bound, however, by the Supreme Court's decision in *Williams* and, as a panel, by our own prior decision in *Metz*, *supra*. Although Judge Adams suggests that *Williams* and its progeny can be distinguished from this case, I can see no meaningful distinction. I believe the principles of *Williams* and *Metz* are controlling.

Even if *Williams* and *Metz* were not controlling, I would still believe that Judge Muir's consideration of the defendant's behavior was not impermissible. I am not suggesting that when judges sentence a defendant for an underlying offense they should indiscriminately impose some increment because he has testified falsely. Judges rarely take such action, recognizing that men on trial may lie under stress and instinctively protect their innocence. But when a judge is outraged by a blatantly fabricated defense committed in his presence and of which he has no reasonable doubt, I do not see any constitutional impermissibility in his considering such conduct in sentencing. I agree with the Second Circuit in *Hendrix*, *supra*, 505 F.2d at 1236, that the sentencing judge should consider his independent evaluation of the testimony and behavior of the defendant only when he is convinced beyond a reasonable doubt that the defendant intentionally lied on material issues of fact. The requirement that the judge be convinced beyond a reasonable doubt offers the defendant a valuable safeguard.

As an additional safeguard to the defendant, I would require that the falsity of the defendant's testimony be necessarily established by the finding of guilt. There must be no possibility that the substantive law applied was such that the factfinder could have believed the defendant's testimony at the same time as it found him guilty. If, for example, a person charged with burglary testifies that he burglarized out of hunger, the substantive criminal law is such that the factfinder could find the defendant guilty even as it finds his testimony wholly truthful. On the other hand, when a defendant testifies to an alibi, a finding of guilt would necessarily rest on a finding that his testimony was false. This additional safeguard thus minimizes the possibility of abuse. A review of the record in this case reveals that Judge Muir applied both these safeguards.

Accordingly, I would affirm the judgment of the sentencing court.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 76-1646

UNITED STATES OF AMERICA

vs.

TED R. GRAYSON, APPELLANT

(D.C. Criminal No. 75-221)

On Appeal from the United States District Court for the Middle District of Pennsylvania

Present: ADAMS, ROSENN and GARTH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was submitted for rehearing under Third Circuit Rule 12(6).

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered March 12, 1976, be, and the same is hereby reversed and the cause is remanded to the district court with directions that Grayson's sentence be vacated and that he be resentenced by the district court without consideration of his alleged false testimony given at trial, in accordance with the opinion of this Court.

ATTEST:

/s/ Thomas F. Quinn
Clerk

January 7, 1977

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1646

UNITED STATES OF AMERICA

v.

TED R. GRAYSON, APPELLANT

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

The petition for rehearing filed by *Appellee* in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judges Van Dusen and Rosenn would grant the petition for rehearing.

By the Court,

/s/ Leonard I. Garth,
Judge

Dated: March 17, 1977

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1646

UNITED STATES OF AMERICA

v.

GRAYSON, TED R., APPELLANT

On Appeal from the United States District Court
for the Middle District of Pennsylvania

Crim. No. 75-221

Submitted Under Third Circuit Rule 12(6)
September 9, 1976

Before: ADAMS, ROSENN and GARTH, *Circuit Judges*

JUDGMENT ORDER

After considering the contentions raised by appellant, namely, that (1) the trial judge erred in refus-

ing to ask the jury panel voir dire defendant's proposed voir dire question No. 3, which provided: "Would you be more likely to find the defendant guilty merely because he has previously been convicted of a crime?"; (2) the trial judge erred in permitting the government to introduce evidence of the defendant's prior conviction for the purpose of impeaching his credibility; and (3) the trial judge erred in imposing a sentence the severity of which was based in part upon the judge's belief that the defendant had committed perjury during the trial, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ Arlin M. Adams
Circuit Judge

ATTEST:

/s/ Thomas F. Quinn
THOMAS F. QUINN, Clerk

Dated: Sep 16, 1976

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 233550 85

Supreme Court, U. S.
FILED
NOV 19 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1572

UNITED STATES OF AMERICA,
Petitioner

—*v.*—

TED R. GRAYSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED MAY 10, 1977
CERTIORARI GRANTED OCTOBER 3, 1977

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1572

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

TED R. GRAYSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Page
Relevant docket entries	1
Excerpts from Transcript of Proceedings Held Before the Honorable Malcolm Muir, United States District Judge for the Middle District of Pennsylvania, commencing February 5, 1976:	
Testimony of Edwin H. Peterson—	
Direct examination	8
Cross examination	16
Testimony of Donald E. Bullard—	
Direct examination	18
Cross examination	20
Testimony of Ted R. Grayson—	
Direct examination	21
Cross examination	34
Redirect examination	49
Recross examination	51
Testimony of Gregory W. Crews—	
Direct examination	53
Cross examination	56

Excerpts from Transcript of Proceedings Held Before the Honorable Malcolm Muir, United States District Judge for the Middle District of Pennsylvania, commencing February 5, 1976:—Continued

Page

Testimony of David M. Lee—
Direct examination 61
Testimony of Alex B. Barnes—
Direct examination 64
Cross examination 68
Testimony of Walter N. Ressler—
Direct examination 70
Cross examination 76
Redirect examination 77
Testimony of Ivan G. Miller, Jr.—
Direct examination 78
Cross examination 79
Testimony of Thomas G. Curd—
Direct examination 81
Cross examination 88
Redirect examination 89
Recross examination 90
Testimony of John J. Steppie—
Direct examination 91
Cross examination 94
Testimony of D. M. Lee [recalled]—
Direct examination 97
Cross examination 99
Testimony of T. R. Grayson [recalled]—
Direct examination 101
Cross examination 103

Transcript of Sentencing Hearing held before the Honorable Malcolm Muir, United States District Judge for the Middle District of Pennsylvania, on March 12, 1976 105

Supreme Court Order dated October 3, 1977, granting the petition for a writ of certiorari 108

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1975	
Nov. 21	1—INDICTMENT—1 Count J.S.2
Nov. 21	2—ORDER—for Warrant of Arrest of Deft. under Bail Reform Act of 1966. (M) 1 cc U.S. Atty.
Nov. 21	WARRANT ISSUED AND HANDED U.S. MARSH. WITH C/C INDICT.
Nov. 24	3—NOTICE—to Deft. setting Arraingment for 12/2/75 at Wmspt., at 11:00 AM with cc Indictment and Financial Affidavit. cc U.S.Atty., Marsh., Prob., Lewis & Scr. Warden, Sandstone, Minn.
Nov. 24	4—MARSHAL ALERT—Detainer filed on 11/24/75 against Deft. at Lewisburg.
Nov. 24	5—PETITION & WRIT—of H.C. Ad Pros. to produce Deft. at Wmspt. on 12/2/75 for Arraignment at 11:00 AM. 2 cc US Marshal (M)
Dec. 2	6—MINUTE SHEET—Atty. Humphrey requested Deft. be placed in Union County Jail for his safety. Atty. for Dist. to file proper motion. Trial Date set for 1/6/75 for jury sel
Dec. 2	1A—PLEA—NOT GUILTY.
Dec. 3	8—ORDER—appointing Atty. Humphrey on 12/2/75 copy to Wash.D.C. (M)
Dec. 12	12—TRIAL LIST—placing case #3 on Jan. 1976 list.

DATE	PROCEEDINGS
1976	
Jan. 6	16—PROPOSED VOIR DIRE—questions.
Jan. 6	17—MINUTE SHEET—of jury selection. Jury selected not sworn. Case to be tried in Jan.
Jan. 6	18—JUROR LIST—12 jurors, 2 alternates.
Feb. 5	25 MINUTE SHEET—of 1st day of jury trial. Pltf. and Deft. present case.
Feb. 6	26 MINUTE SHEET—of 2nd day of jury trial. Counsel close. Court charge. Deliberations 12:30 PM to 4:15 PM. Guilty Verdict. presentence ordered. Sentencing set for 2/27/76 at 1 PM at Wmspt.
Feb. 6	27 VERDICT—Guilty.
Feb. 12	31 NOTICE—of Clerk to counsel of record: Sentencing set for Friday, Feb. 27, 1976, 1 P.M. at Wmspt., Pa. Copies to U.S.Marshal, U.S.Prob. Scrn and Lewis; Deft and Warden, Lewisburg Pen.
Feb. 13	32 MOTION—of Defense for new trial, and CERTIFICATE—of service.
Feb. 17	34 PETITION & WRIT—to produce deft. for sentencing on 2/27/76 at 1 PM at Wmspt. 2 cc U.S. Marshal.
Feb. 23	35 NOTICE—of Clerk to counsel of record: sentencing set for Friday, March 12, 1976, 12:45 P.M. at Wmspt. Pa. Changed at request of Prob. Officer Copies to Marshal, Prob., Warden MCC, N.Y., Deft. and Atty Humphrey
Feb. 25	38 PETITION & WRIT—of habeas corpus ad prosequendum for deft. to appear on 3/12/76, at 12:45 at Williamsport to be senenced. (M) 2 cc U.S. Marshal.
Mar. 12	43 MINUTE SHEET—of Sentencing. Deft. advised of right of appeal.

DATE	PROCEEDINGS
1976	
Mar. 12	44 COURT REPORTER—notes of sentencing.
Mar. 12	45 JUDGMENT & COMMITMENT—Deft. committed to imprisonment for 2 years. The sentence shall begin at the expiration of any sentence or sentences the defendant is now serving or for which he is being held. (M)
Mar. 23	47 BRIEF—in Support of Defendant Motion for New Trial, C. of S. copy to Court.
Apr 5	49 BRIEF—of U.S. Atty. in opposition to deft.'s motion for a New Trial and C. of S. C. Ct.
Apr. 8	50 NOTICE RETURNED—on Sentencing change of date. Marked "Deft. not at FCI, Sandstone, Minn."
Apr. 12	DEFT. COPY OF JUDGM. & COMMITMENT—back to Sandstone, Minn. on info. of Marshall.
Apr. 22	51 MARSHAL'S RETURN—of Judgment and commitment, delivered deft. to FCI Sandstone, Minnesota.
Apr. 30	52 ORDER—Motion for a new trial is denied. (M) Copies to counsel from Wmpst.
May 4	55 APPEAL—in forma pauperis filed by attorney for deft. appealing the Order of the Court dated April 30, 1976 denying Defendant's motion for New Trial, and from the sentence imposed on March 12, 1976. copies to Court of Appeals, Court, U.S.Atty, Marshal, Prob., Deft., Atty. Humphrey.
May 6	RECORD ON APPEAL—together with Notice of Appeal mailed this date to Court of Appeals. Doc. #9 and 44 not included, Court Reporter Notes.
May 17	57 RECEIPT—for record on appeal.
May 28	FIRST SUPPLEMENTAL RECORD—on Appeal mailed. Consists of Docs. 56, 58, and 59. (Doc. #57, receipt, not incl.)

DATE	PROCEEDINGS

1976

June 21 60 RECEIPT—for First Supplemental Record on Appeal.

June 24 61 TRANSCRIPT—of sentencing of 3/12/76.

June 25 SECOND SUPPLEMENTAL—record on appeal mailed consisting of Doc. 61.

July 26 63 RECEIPT—of second supplemental Record on Appeal received

1977

Jan. 17 64 OPINION—Sur Panel Hearing from Ct. of Appeals. Sept. 16, 1976 Judgment of District Court affirmed. On Oct. 15, 1976 Judgment Vacated and Petition for Panel Rehearing granted Oct. 15, 1976. Submitted for Rehearing under Third Circuit Rule 12(6) on 10/15/76. Opinion filed Jan. 7, 1977 reversing District Court and Remanding with directions that Grayson's sentence be vacated and that he be resentenced by the district court without consideration of his alleged false testimony given at trial. WM 1/18/77

Jan. 31 65 ORDER AMENDING SLIP OPINION—The second sentence of last para. on page 21 of slip opinion shall be amended to read "I am not suggesting that a judge who sentences a deft. for an underlying offense should indiscriminately impose some increment because the deft. has testified falsely. (Rosenn) copy to Judge Muir.

Mar. 28 66 JUDGMENT ORDER of 1/7/77.—(certified copy) from Ct. of Appeals reversing the judgment of 3/12/76 of the District Court. The cause is remanded to the district court with directions that Grayson's be vacated and that he be resentenced by the district court without consideration of his alleged false testimony given at trial, in accordance with the opinion of this Court. Certified as a true copy and issued in lieu of a formal mandate on 3/25/77.
copy to Judge Muir.

DATE	PROCEEDINGS

1977

Mar. 28 CASE FILE RETURNED FROM CT. OF APPEALS.

Apr. 4 67 LETTER—from U.S. Atty. to Court requesting that resentencing be deferred for at least 30 days, pending Govt. decision to file Petition for Certiorari.

Apr. 4 68 LETTER—from Deft. counsel opposing extension of time for resentencing, and requesting another pre-sentence conference.

Apr. 6 69 ORDER—the sentencing in the above case is set for Friday Apr. 29, 1977 at 12:15 PM in Wmpst, Pa.
In the event that the Government files a petition for certiorari with the Supreme Court of the U.S. on or before 4/28/77, the sentencing shall be postponed until the matter is disposed of by the U.S. Supreme Court. (M) copies counsel, U.S.Marsh, U.S. Prob., Deft.

Apr. 14 70 REQUEST—of U.S. Atty. to Court to continue the sentencing indefinitely, since Petition for Certiorari will be filed on or before 5/16/77 with the Supreme Court by the Govt.

Apr. 14 71 ORDER—the motion of U.S. Atty. for continuance of the sentencing indefinitely is denied. (M)
copies to counsel of record.

Apr. 15 72 LETTER—from deft. counsel objecting to govt. continuance request.

Apr. 18 73 LETTER—from US Atty. to Court stating that since deft. is now serving another sentence, an early resentence would be meaningless, and that the district court should not do anything to preempt the action of the Supreme Court.

Apr. 20 74 WRIT OF H.C.AD PROS.—to produce Deft. at Wmspt. on 4/29/77 at 12:15 PM for resentencing. (M) copies U.S. Marshal, Lewis.

DATE	PROCEEDINGS

1977

Apr. 25 75 NOTICE—fixing RE-SENTENCING for 4/29/77 at 12:15 P.M. at Wmsp. cc to all concerned.

Apr. 29 76 US MARSHAL'S—Return of service on Writ of H.C. Ad Pros, stating, "On this 27th day of April, 1977, returned above writ unserved as case continued".

May 2 77 ORDER—(cert. copy) from Court of Appeals. Upon Consideration of the petition of the U.S. for recall and stay of mandate in the above entitled matter, It is ORDERED that the mandate of this court is herewith recalled and its reissuance is stayed for a period of 30 days. If during such period the U.S. files with the Supreme Court of the U.S. a petition for a writ of certiorari, the stay of the reissuance of the mandate shall continue until disposition of the proceedings in the Supreme Court. Dated 4/26/77. cr Court, U.S. Atty., Marsh, Prob.

May 4 RETURN OF—CERTIFIED JUDGMENT in lieu of Formal Mandate issued on 3/25/77, to the Court of Appeals per request of letter of 4/26/77 attached to Doc. #77.

May 4 78 TRANSCRIPT—of two days of jury trial, Feb. 5 and 6, 1976.

Sept. 26. 79 APPLICATION—of defense for Bail pending Appeal and Resentencing, and C. of S. copy Court.

Sept. 28 80 ORDER—Grayson's application for bail pending appeal and resentencing is denied. (M) copies counsel of record.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Criminal No. 75-221

UNITED STATES OF AMERICA

vs

TED R. GRAYSON

Williamsport, Pennsylvania
February 5 & 6, 1976

BEFORE: HONORABLE MALCOLM MUIR, and a jury.

APPEARANCES:

For the United States:

Harry A. Nagle, Asst. U.S. Atty.
P. O. Building
Lewisburg, Penna. 17837

For the Defendant:

John H. Humphrey, Esq.
Fidelity Nat'l. Bank Building
Williamsport, Penna. 17701

[18]

• • • •

THE COURT: I told you originally, Ladies and Gentlemen, that there were various classes of evidence. Counsel in this case have agreed or stipulated to certain facts, and the purpose of the agreement reduced the number of witnesses to be called and reduced the amount of time expended by you in the trial of this case.

They have agreed to the following facts:

The Defendant was convicted in the United States District Court for the Eastern District of New York of a crime; that he was sentenced by a judge at the United

States District Court for the Eastern District of New York to the custody of the Attorney General; that the Federal Prison Camp at Allenwood was designated by the Attorney General of the United States as the institution for the service of this sentence by the Defendant; that the Defendant was committed to [19] the Allenwood Prison Camp by the Attorney General of the United States or his designate, on August 29, 1975, pursuant to that conviction in the United States District Court for the Eastern District of New York; that the Defendant left the custody of the Attorney General of the United States, or his designate, on October 11, 1975, the date charged in the indictment, and that the Defendant left the custody of the Attorney General and the Allenwood Prison Camp on October 11, 1975 without permission.

Now is that a fair statement of what was agreed upon, Mr. Nagle?

MR. NAGLE: Yes, your Honor.

THE COURT: Mr. Humphrey?

MR. HUMPHREY: Yes, your Honor.

THE COURT: Very well.

• • • •

[20] EDWIN H. PETERSEN, witness called, being duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q How do you spell your name?
A P-e-t-e-r-s-e-n.
Q Your first name?
A Edwin.
Q Do you use a middle initial?
A Edwin H.
Q What is your occupation?
A I am employed as a special agent for the F.B.I. assigned to the New York office.
Q And how long have you been a special agent for the [21] F.B.I., Mr. Petersen?
A Approximately six and a half years.

THE COURT: Thank you.

BY MR. NAGLE:

Q Mr. Petersen, you are assigned to the New York City office of the F.B.I., is that correct?
A Yes, that is correct.
Q And were you working on that assignment in New York City on or about October 11, 1975?
A Yes I was.
Q And shortly after October 11, 1975, did you receive any information about an alleged escape of one Ted R. Grayson from the Federal Prison Camp at Allenwood, Pa.?
A Yes I did.
Q And in the course of your duties as a special agent of the F.B.I. in New York City, did you have an occasion to do any investigation as to the where abouts of Mr. Grayson?
A Yes.
Q And what information did you receive as to the possible where abouts of Mr. Grayson which initiated your investigation?
A Well, the Philadelphia Division had sent us a communication saying certain leads for us to cover, one of which was to interview relatives and another to conduct an [22] investigation at I believe 4 Park Avenue, New York City. And upon conducting this investigation we went to the address of 4 Park Avenue, New York City, and went to a certain apartment, according to the communication, and identified ourselves to the people inside this apartment and eventually located an individual who resembled the photograph we had of Mr. Grayson.
Q And did you speak to this individual?
A Yes we did.
Q Did you attempt to obtain his identity?
A Yes we did, and he had no identification on him, no wallet, no identification.
Q Did you ask him what his name was?
A Yes.
Q What did he say?

MR. HUMPHREY: Your Honor, I would object to this. Perhaps we better approach side bar.

THE COURT: All right.

(At side bar.)

MR. HUMPHREY: I don't see the relevance of what conversations with Mr. Grayson being had are? There was no statement made as far as I am aware, and of course he has a right to remain silent, I think, short of an admission that any conversation between the agent and Mr. Grayson which is relevant in this case.

[23] MR. NAGLE: Your Honor, I believe the question raised has to do with a Miranda-type situation. We are not attempting to get into that.

THE COURT: You are now?

MR. NAGLE: We are not attempting to get into that. The Defendant was advised of his rights but did not make any statement. I don't think that is an issue in this case.

On request by a police officer to have a person identify himself is beyond, as I understand it, the Miranda rule. The police officers are entitled to ask and receive a person's identification in the course of an investigation; and as long as it doesn't go beyond name and address, it is properly admissible. It is relevant to this case in view of the opening statement of the Defense that he left because of his own protection. And after leaving Allenwood on the 11th of November, two full days later, some several hundred miles later, in New York City when he was approached by people and the F.B.I. and refused to admit an identity, therefore continuing his escape status after he had been removed from the alleged danger at the camp; and even assuming that there was some compulsion—I'm not saying there was—but [24] assuming there was some compulsion for him to leave the camp, once he leaves the camp and makes a decision to stay out, that is an escape.

THE COURT: Well I think that the evidence is probably admissible, but I am troubled as to whether it should now come in the case or whether it should be rebuttal evidence.

MR. HUMPHREY: Your Honor, with that observation I would withdraw my objection and permit this evidence concerning any failure of Mr. Grayson to identify himself.

MR. NAGLE: I think it should come in now for the reason, your Honor, that it is part of the Government's case in chief that the escape was started and was a continuing escape. The opening statement made is relevant to the Government's case in chief.

THE COURT: All right. He withdraws the objection.

(In open court.)

BY MR. NAGLE:

Q Now did you attempt to obtain identity from the Defendant?

A Yes.

Q What response did you get from him?

[25] A We asked him if he was in fact Ted Grayson, and he denied he was Ted Grayson.

Q He denied he was Ted Grayson?

A Yes.

Q How many times did he deny it, once or more than once?

A It was several times. And based on our observations of the photograph, or the telephoto, or the copy that we had, we felt there was strong enough resemblance that this was the individual who was identical to Ted Grayson.

Q Now when did you have any recollection of the moment, the time, and the hour that this confrontation between you and Mr. Grayson occurred or began?

A You mean the time that we had entered the apartment and had confronted him?

Q Yes?

A I would have to say it was approximately 10:15, somewhere in that area.

BY THE COURT:

Q In the morning?

A Yes, your Honor.

BY MR. NAGLE:

Q When did your visit with Mr. Grayson conclude?
A I would say approximately 15 or 20 minutes thereafter.
[26] Q In the apartment?
A Yes.
Q Now after you left the apartment, where did you go?
A We brought him back to the New York office of the F.B.I.
Q And you were in the car with him?
A Yes I was.
Q I don't know if I covered this point: who was with you, who accompanied you to this apartment?
A Special Agent Donald Bullard.

BY THE COURT:

Q Bullard?
A Yes, your Honor.

BY MR. NAGLE:

Q He was a special agent of the Federal Bureau of Investigation at that time?
A Yes, at that time.
Q He has since retired, is that correct?
A Correct.
Q While you were at the apartment, were you and Mr. Bullard in each other's company and the Department's company?
A Most of the time, yes.
Q Now were you and Mr. Bullard and the Defendant in the same car when you left the apartment?
[27] A Yes.
Q Where did you go to in the car?
A We returned to the New York office of the F.B.I.
Q And you took the Defendant with you?
A Yes.
Q Did you make any attempt in the car to obtain Mr. Grayson's identity?

A We asked him again, and he stated that he wanted to contact an attorney, and we didn't pursue it any further.
Q You took him down to your office?
A Yes.
Q What happened there?
A Well we told him we would make arrangements for the necessary photographing and for fingerprinting, and we felt pretty strongly that he was in fact identical to Ted Grayson. And we told him thereafter he would be remanded to the custody of the United States Marshall at the Manhattan Correctional Center.
Q Now Mr. Petersen, did you tell the Defendant when you first met him that morning whether or not he was suspected as being Ted Grayson, the escapee, from Allenwood?
A Yes, we stated the charges, right.
Q And he denied being Ted Grayson?
A That is correct.
Q You had a flyer? Do you have it with you?
[28] A Yes I do.
MR. NAGLE: Your Honor, I will mark this as Government exhibit 2 and show it to counsel for the Defendant.

(Handed to Defense counsel for review.)

BY MR. NAGLE:

Q I show you what has been marked for identification as G-2. What is this?
A This is the flyer we had received through our Philadelphia office.

(Flyer with photo of Grayson—produced and marked for identification as Government exhibit No. 2.)

BY MR. NAGLE:

Q This is a xerox copy of a bulletin, is that correct?
A That's correct, with a copy of a photograph of Ted R. Grayson.

Q At the top it says U.S. Prison Camp, Allenwood?
A That is correct.
Q Then there is information regarding the escapee, is that correct?
A Yes, personal description and background data.
Q Did you have that with you when you met Mr. Grayson in the apartment?
[29] A Yes, this is what we used for identification.
Q Did you take it out of your pocket and hold it up like you are holding it now?
A Yes.
Q In front of Mr. Grayson?
A Yes, I had it in my hand while I was looking at Mr. Grayson.
Q And you asked him if he was Ted R. Grayson?
A Yes.
Q What was his response?
A He denied it.
Q And because of the similarity in the photograph you took him anyway?
A Yes.
Q For interrogation?
A Yes.
Q Is the Defendant the man that you met in the apartment that morning seated here today?
A Yes he is.
Sir?
THE COURT: It would be better if you didn't ask me any questions.
He was about to ask me a question, Mr. Nagle, and I was concerned that there might be something in the question that would be improper for me to hear.
[30] You are at liberty to discuss the matter with him if you wish privately.
MR. NAGLE: All right.
Your Honor, I would move for the admission into evidence of the top half of Government exhibit No. 2, eliminating the bottom half which has to do with matters which we discussed at side bar.
MR. HUMPHREY: What is the top half?
MR. NAGLE: Above this, from there up.

MR. HUMPHREY: I have no objections.
THE COURT: Well we will admit the top half.
MR. NAGLE: I will draw a line there.
THE COURT: Please do that so there is no dispute about what is being admitted.
Do you want to take a look at this, Mr. Humphrey? Mr. Nagle just drew a line as to what is admissible and what is not.
MR. HUMPHREY: I have no objections.
THE COURT: I suggest before the jury retires to the juryroom to deliberate that you ask the Clerk to fold that document at the point where you have a line and make a photocopy of it so that the jury can take that out.

Government exhibit No. 2, having been previously identified, was received into evidence, as amended.

[31] BY MR. NAGLE:

Q Up until the time you arrived at your headquarters office in New York, you and Mr. Bullard and the Defendant were together, is that right?
A That's correct.
Q When you arrived at your office, was there an occasion when you left the room in which the Defendant was present?
A With Mr. Bullard?
Q Yes.
A Yes.
Q So there was a time when you were out of the Defendant's presence and out of Mr. Bullard's presence?
A Right, that's right.
Q How many other people were in the Department when you and Mr. Bullard arrived over there?
MR. HUMPHREY: Your Honor, I don't think that is relevant.
THE COURT: Why is it relevant, Mr. Nagle?
MR. NAGLE: The purpose of the inquiry, your Honor, is on the further testimony of the Defendant's reluctance to give up his identity.

THE COURT: Well I don't understand how the number of people there has anything to do with the reluctance to [32] identify himself.

MR. NAGLE: Well your Honor, it is a preliminary question as to whether or not any of the other people identified him in any way.

THE COURT: I am going to sustain the objection as to the number of people because I don't think that does prove the case one way or the other, just as to the number.

BY MR. NAGLE:

Q Did you question the other people present in the apartment as to the identity of the Defendant?

A Yes.

Q What did they tell you as to the identity of the Defendant?

A The people that were in that apartment were uncooperative.

Q Uncooperative? In other words they would not tell you who he was?

A No.

MR. NAGLE: No other questions, your Honor.

THE COURT: You may cross examine.

CROSS EXAMINATION

MR. NAGLE: Defense counsel received a copy of this agent's report in the pre-trial discovery.

THE COURT: Very well.

BY MR. HUMPHREY:

[33] Q Now you took Mr. Grayson into custody at 4 Park Avenue, New York City, is that correct?

A That's correct.

Q When was it that he first told you he wanted to talk to a Lawyer?

A I believe at that one point while we were in transit to our office.

Q Did he mention that in the apartment?

A I don't recall.

Q Did you hand cuff Mr. Grayson?

A No, we did not.

Q Did he attempt to escape your custody at any time?

A Well I held him by the arm.

Q At all times?

A Yes, just about the entire time.

Q Was Mr. Grayson, other than his reluctance to tell you who he was, was he in any other way resisting your attempt to place him under arrest, or your taking him under arrest?

A No, I don't think he resisted.

MR. HUMPHREY: I have nothing further.

Excuse me, your Honor.

THE COURT: All right.

BY MR. HUMPHREY:

Q Who drove the car that you took Mr. Grayson to the F.B.I. headquarters in?

[34] A I believe it was agent Bullard. I don't recall. I believe it was Bullard, though.

Q You are not sure?

A No.

Q In other words it could have been you driving that car?

A I seem to think it was agent Bullard. I'm not sure, though.

MR. HUMPHREY: All right. Nothing further.

THE COURT: Mr. Nagle, any redirect?

MR. NAGLE: No, your Honor.

THE COURT: All right. You may step down, sir. Thank you.

(Witness excused.)

• • • •

[35] DONALD E. BULLARD, witness called, being duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q Your last name is Bullard?
A That's correct.
Q B-u-l-l-a-r-d?
A That's right.
Q What is your first name?
A Donald. Middle initial E.
Q E as in Edward?
A Yes.
Q Were you sometime a special agent of the F.B.I.?
A I was.
Q And you are now retired?
A Yes I am.
Q Where was your last station?
[36] A New York City.

THE COURT: Very well.

BY MR. NAGLE:

Q Now Mr. Bullard, you are now retired, is that correct?
A That's correct.
Q When did you retire?
A November 7th.
Q On October 11, 12 and 13 of 1975 you were employed as a special agent of the Federal Bureau of Investigation at the New York headquarters office, is that correct?
A I was.
Q And did you work with the previous witness in this case, Mr. Edwin Petersen?
A Yes sir, I did.
Q And did you, together with Mr. Petersen, conduct an investigation into the whereabouts of one Ted R. Grayson, who was alleged to be an escapee from the Allenwood Prison Camp?
A I did.
Q And did you go with Mr. Petersen to the apartment at 4 Park Avenue, New York City on the 13th of

October, 1975, for the purpose of investigating the whereabouts of Ted R. Grayson?
A I did.
[37] Q And did you find him there?
A Yes I did.
Q Now will you tell the Court and jury whether or not the Defendant was found there?
A I beg your pardon?
Q Was the defendant found at that apartment?
A Yes he was.
Q And was he questioned as to his identity?
A He was.
Q And what was his reply?
A He denied being Ted Grayson.
Q He denied being Ted Grayson?
A That's correct.
Q Was he later removed from that apartment and taken to your headquarters office?
A He was.
Q Now when did you first find out that he was Ted Grayson?
A Well I had suspicions of him being Ted Grayson on his resemblance of the photograph, the facsimile to the person. I didn't find out positively from his own admission until he made a phone call to his attorney and he identified himself on the phone to his attorney.
Q Will you tell us the words used in the phone call up to that point?
[38] A "This is Ted Grayson" he was advised of his rights in which he was told he had a right to have an attorney, and he said I want to call an attorney. He furnished a number and he called an attorney, and at that time he mentioned his name.
Q He said it on the phone?
A He said this is Ted Grayson, yes.
Q Up until that time had he ever admitted to you or to Mr. Petersen that he was Ted Grayson?
A No.
Q Did he admit his identity after the phone call?
A No, he didn't discuss it any further.

Q But he identified himself to the other person on the telephone as Ted Grayson?
A That's correct.
Q And is that person here in Court, the Defendant?
A I beg your pardon?
Q Is the man you arrested as Ted Grayson, is he here in Court?
A Yes he is.
MR. NAGLE: That's all.
THE COURT: Cross examine.

CROSS EXAMINATION

BY MR. HUMPHREY:

Q In your opinion is this the photograph and did it look like the Defendant at the time you made the arrest at 4 [39] Park Avenue?
A He was a resemblance.
Q Did Mr. Grayson say I am not Ted Grayson, or did he say sometuhing to the effect that I'm not saying whether I am Ted Grayson or not?
A He woldn't admit being Ted Grayson. Actually to his words as to that I don't recall.
Q You're not saying for sure that he said I am not Ted Grayson, is that correct?
A He was asked if he was Ted Grayson, and he denied being Ted Grayson. He wouldn't identify himself.
Q By denying it did he say no, or did he say I am not saying? I mean did he deny that he was Ted Grayson or did he say or refuse to admit that he was Ted Grayson?
A Well at the time in the room up there, he denied being Ted Grayson. At the time in the office he just refused to discuss it any further.
Q Did Mr. Grayson resist arrest of him in any way?
A No.
Q And after leaving 4 Park Avenue, did you take him in the car to the F.B.I. headquarters?
A Ultimately we went to the F.B.I. headquarters, yes.
Q Who drove the car?

A I am not certain. I think it was Petersen. I'm not sure.
[40] Q Were you sitting in the rear seat with Grayson?
A I believe so, yes.
Q Did you have him hand cuffed?
A Yes, I believe so.
MR. HUMPHREY: I have nothing further, your Honor.
THE COURT: Mr. Nagle, any redirect?
MR. NAGLE: No further questions.
May this witness be excused?
THE COURT: You have no further questions?
MR. NAGLE: No sir.
THE COURT: All right. You may be excused. Thank you.

(Witness excused.)

• • • •

[42] TED GRAYSON, witness called, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HUMPHREY:

Q State your name please.
A Ted R. Grayson.
Q And you are the Defendant in this case?
A I am.
Q And you heard the stipulation which was entered into that you were in the lawful custody at the Allenwood Prison Camp and that on October 11, 1975, you left the Allenwood Prison Camp without permission, is that correct?
A That is true.
[43] Q What time did you leave the Allenwood Prison Camp on October 11th?
A A few minutes after a count.

BY THE COURT:

Q I couldn't hear you.

A A few minutes after one of the correction officers counted his inmates in the dorm.

BY MR. HUMPHREY:

Q Do you know approximately what time that was?
A Approximately 9:30.
THE COURT: I'm sure that Mrs. Stover and the jury didn't hear that.
Did you hear that?
MRS. STOVER: No.
THE COURT: You must speak loudly enough so that everybody can hear what you are saying.
THE WITNESS: About 9:30.

BY MR. HUMPHREY:

Q Is that p.m.?
A Yes, in the evening.
Q And why did you leave?
A I had just been threatened with a large stick with a nail protruding through it by an inmate that was serving time at Allenwood, and I was scared, and I just ran.
Q Now is it difficult to escape from Allenwood?
[44] A No it is a minimum security honor camp with no wall around it or anything to restrain the prisoners or keep them in.
Q Please speak up.
A It is a minimum security camp with just a fence around, no wall or anything to restrain the inmates. It is an honor camp.
Q Are there substantial numbers of guards around?
A In the evening I believe there are only two guards on the grounds, and one guard in the control center. It is just a skeleton crew in the evening.
Q Now when were you committed to Allenwood?
A August 29, 1975.
Q And when you were committed there, when you were first committed to the Federal custody, did you have to give any information about yourself, any address?
A Oh, sure.
Q What did you give as your home address?

A Four Park Avenue, New York City.
Q Was that your residence?
A Yes it was. I also had personal belongings that I had at the time I was sent to that address by the federal system.
Q Now I also want to get into the events leading up to October 11 when you state you were threatened, and I would [45] ask you what was the first thing that occurred or happened to you at Allenwood that led to this incident of October 11th?
A I had gotten involved in a poker game, and I lost what is currency between inmates or cigarettes and I had lost quite a few cartons of cigarettes.
Q When was this poker game?
A About two or three weeks prior to when I left, two and a half weeks. That was the problem that arose from it.
Q Would this be approximately a month after you first got to Allenwood?
A A little less, about a month.
Q And you stated that the currency between prisoners was cigarettes. How many cigarettes did you lose in this poker game?
A Forty cartons.
Q And to whom did you owe forty cartons?
A There was a dealer, the house is the term, and I owed them to him.
Q And how many people were involved in this game?
A Originally four and then it dropped down—well four and the dealer, five, then four because one person dropped out, and the game continued, and there was the four of us.
Q And did you owe these 40 cartons of cigarettes to the dealer, then?
[46] A To the dealer and the people who were playing. If they were owed cigarettes it was up to the dealer to pay them.
Q But you ended up owing the dealer cigarettes?
A Yes.
Q What was the dealers name?
A His nickname was Sarge. That's what I knew him as. Later on I found out that his last name is Barnes.

BY THE COURT:

Q I can't hear you. Later on you found out his last name was Barnes?

A Yes, your Honor.

BY MR. HUMPHREY:

Q Why do you deal in cigarettes? Why is that the mode of currency that you were familiar with?

A Inmates aren't allowed to have cash. Any cash that an inmate may receive is put in a commissary account so that it is just on paper. It is on the books for that inmate so that they can purchase things from the store. So the most valuable commodity is cigarettes.

Q And how do you spend this money in the commossary account?

A Once a week you are allowed to go to the commossary store that is in the complex. It is on the grounds, and you can purchase, within certain regulations, a certain amount of money each week, I think it is $45 a month that an inmate is [47] allowed to spend, four cartons of cigarettes per week as a maximum. And you purchase them and sign a receipt that you spent that much money, and it is deducted from your account.

Q I take it that you don't actually get money to give to the person at the commossary, but it is actually a paper transaction, is that correct?

A Yes. Money is contraband.

BY THE COURT:

Q What does a carton of cigarettes cost at the commossary?

A Thirty cents a pack, or about $3 a carton.

Q Three dollars a carton?

A Yes.

BY MR. HUMPHREY:

Q Now did you pay Sarg, Mr. Barnes, this debt of 40 cartons of cigarettes?

A I started to pay him. The ruling that I can only purchase at a time four cartons of cigarettes a week

made it impossible to pay him at one time, plus I didn't have that much money in my account at that time.

Q Did you make a payment to him?

A Yes I did.

Q And what did you give him at that time?

A I give him 35 packs of cigarettes, and he told me to purchase Kool cigarettes which is what he smokes, and I [48] purchased them for him. Also I purchased crackers and other ediables, candy, cake.

Q Now you say you gave him other edibles. Was this his request or did you just give those to him in lieu of cigarettes?

A He kind of took them, and he didn't push me out of the way and grab them, but my locker was open and I was paying him the cigarettes, and he said I also want this and this. And I just recorded what he was taking and the amount of money that each item cost, and I added it up. I didn't argue with him.

Q Now did you make the purchase of these goods at one time, the cigarettes and the other edibles that you discussed?

A I made two purchases. The first was one week. And since the maximum of cigarettes I could purchase was four cartons, I didn't deplete my funds in my account, and the following week I spend the balance and purchased cigarettes again.

Q How soon after the poker game did you make this first payment to Sarge?

A About a week.

Q Now you say you gave him 35 packs of cigarettes which is three and a half cartons?

A Yes.

[49] Q That left a substantial debt still existing. Was anything said about that debt?

A I expected the poker game to continue. When the game had started, the dealer and the two people were friends, and I didn't even suspect that there was any cheating or anything like that, and as the game proceeded —I'm not a great poker player, but I'm not a poor card player, and I kind of felt that they were cheating. I suspected they were. And the debt, I had run it up to 180

cartons of cigarettes and continued to play and won back 140 cartons. And they stopped the game.

And I am fairly confident that if the game had continued, I would have been able to win back my losses. I was watching them and looking for somebody hiding a card or—different games at different rules, and there is ways to cheat. And they never played again. He kept saying that he was going to put the card game together again, and I would be able to play, but he never did.

Q Now then again after this initial payment to him, did Sarge request the balance of the payment?

A Yes, but he told me that he wanted cash, which is against the rules, but it is more valuable than cigarettes of course.

Q Why is cash valuable if you can go into the commissary and purchase things?

[50] A There is certain contraband that is desirable. Alcohol and things like that cannot be purchased with cigarettes and somehow or other are smuggled into the camp. And the only way to purchase items like this are with cash. Cigarettes won't purchase them. So cash is more valuable.

Q You say that Sarge asked you for cash. Did he say how he expected you to get this cash?

A Yes, he wanted a visitor, a girl friend that was visiting me, to smuggle the money—to hand it to me and then have me smuggle it in. And I told him no, that I wouldn't do it, that I would pay him in cigarettes in time, giving him 35 packs each week until I paid the balance. And he insisted that he wanted cash. And I argued that the game was for cigarettes. That is the way I should be able to pay off that way. That is the explanation.

That particular day that he demanded cash, he was with his two friends that were at the card game with him, and he pushed me up against the wall, grabbed me by the hair and told me that I would pay him, and I would pay him in cash.

I probably said yeah, ok, you know, what ever you say, and that was the end of that.

Q Well, after you initially said then that you weren't going to pay him in cash, what happened after that in

the days that followed? Was there any other pressure put on you?

[51] A We didn't sleep in the same dorm, you know. And he worked at a different job than I did, so we didn't see each other all the time. It was just after certain hours that we were exposed to each other. And he made remarks such as I will pay him, and it would be cash. And at that point I don't think I was arguing whether it was going to be cash or not. I just expected either the poker game to continue or to be able to pay him with cigarettes, which is what I really expected to do. And he said something to me that I would pay him or not to be there. Pay me or don't be here.

Q Do you know when that was?

A That was the day that I left. When he told me that he wanted cash from me and threatened me with this stick. It is a board, a board, two days later. It was only two days.

Q When was the first time he actually physically touched you concerning this debt?

A I left Allenwood Saturday, so it was Thursday, two days prior to when I left.

Q October 9?

A Yes.

Q And did you tell him at that time that you were going to pay him?

A I might have led him to believe that I was.

Q And when was the next time that you and he had a confrontation?

[52] A The next time, you know, he didn't hurt me.

Q On October 9th, he didn't hurt you?

A No, he didn't. But on the 11th he actually punched me and pushed me up against the wall. And I was attempting to protect myself and block his blows.

Q Where did this fight take place?

A The front part of the dormatory building.

Q What dormatory is that?

A It houses 2, 5 and 6.

Q And what led him to stop this scuffling, or this fight, with you?

A It was in front of the whole camp. The officers were walking around in the compound. People were coming into the dormatory, and it was in front of the window. I kept moving in that direction to keep myself in view for my own protection.

Q Now approximately what time was this?

A 3:30. It was just after I had a visitor and I just came back from the visiting room, and he wanted, you know, do you have cash for me? I think that is what he said. And he was taking off his watch as he said this. And I said no.

Q Did you give him anything?

A I had a ring, a gold ring, that I took off and gave him.

Q Did he accept that as payment?

[53] A He grabbed it out of my hand and laughed and said well, I can't do anything with this, and hit me.

Q Did he give the ring back?

A No he didn't.

Q Now did something occur between you and Sarge later on that evening?

A Yes. He entered the dormatory. The dormatory has an entrance in the back and an entrance in the front, and he came in through the back. He had a long board about this long with a nail protruding through it. And he walked over to my bed—I was laying down and reading—and lifted the board and told me to come with him, held it over his head and said come on with me.

I got up off the bed and started to walk out the dormatory panicking. I just, you know, I was looking for a place to run. There were two other guys standing at the back of the dormatory, and one of them said to him, hey Sarge that is not very cool, you know, what you are doing. And somebody hollered "Count". It was count time. And between the two remarks it was enough. He wasn't going to hit me while the officer was coming in, or even to be caught with a board in his hand, and he went outside the dormatory and just left.

Q Who were the two individuals that you said saw this?

A Quite a few people saw it.

[54] Q Do you know any of their names?

A The first names, I know some of their first names, one fellow's name was Charlie. I know the fellow that slept next to me, Richard Ventrola. I know his last name. I tried to get in touch with him. I haven't been able to. Some of Sarge's men were in the dormatory at that time.

Q Well what was your feeling? How did you feel at this time when he had this board?

A He had said, prior to the board incident, it was when he had hit me, something about inmates being stabbed in their sleep for debts such as this. It is not a new thing. It wouldn't be the first time this has happened. And I either pay him or not be there.

And when he came in with the board, I couldn't believe it was happening first of all. And I kind of felt well as long as I am in the dormatory in front of everybody, he is not going to hit me with the board. When he told me to get up and come on and go outside the dormatory threatening me with the board, when I was walking in front of him towards the door I was thinking not to go outside of the dormatory because once I did, it was getting dark—in fact it was dark out there—and there would be nobody to see it. I was scared. I was just—I'm sure I wasn't, you know, rational or anything. I was scared.

Q You said one of the reasons that he departed was [55] someone had yelled "count". Was in fact a count made at that time?

A Yes.

Q And what did you do following that count?

A I left Allenwood. I grabbed my coat and ran.

Q Did you take anything else with you?

A No.

Q Did you take any of the property out of your locker?

A No.

Q How come you didn't?

BY THE COURT:

Q Did you answer that question?

A Yes, your Honor. I did not take anything.

THE COURT: All right.

BY MR. HUMPHREY:

Q How come you did not tell the officer making the count that your life had just been threatened?

A For several reasons, and I thought of that afterwards, you know; but perhaps I should have handled the problem another way. At that time first of all I was just so scared, and there was only two guards that walk around at night. And there is no lock up facilities there. There is no security facilities at Allenwood. Everything is open. There are no bars or anything like this.

[56] And there would be no place for the officer to put me. Plus I felt that they probably get stories from inmates all day long about problems like homosexual problems, their lives being threatened, that he probably would have said to me, well, go to sleep and I will keep my eye on you.

Well there are 400 inmates at Allenwood with two officers and eight dormatories. I felt that if I had gone to sleep, I might not wake up.

Q Were there any of Sarge's acquaintances in your dormatory?

A Yes.

Q Were they anywhere near your bunk?

A Yes. One slept right across from me.

Q How come you didn't take this problem of the pressure being applied to you to the authorities prior to this evening of October 11th?

A It only really became pressure two days before, and it didn't appear to be a threat to my life, you know. I didn't think it would go any further.

I also didn't want to mark myself as being an informer, knowing that I am serving a sentence and that I am going to be exposed to the prison grapevine, I didn't want to put my life further in danger.

At that time my life wasn't in danger, but later on, on Saturday, the day that I left, the thought of turning [57] around and running to a correctional officer and saying, listen this guy is threatening me—I would have had to have done this in front of everybody. And he would have me tagged an informer. And I don't think it would have resolved anything.

Q Now prior to October 11th,—I just wanted to get this straight—how many payments of cigarettes, or whatever, had you made to Sarge?

A Two.

Q You said one was within a week after the poker game?

A Yes.

Q And when was the next?

A The following week.

Q Now when you left Allenwood, and this was right after this count that you referred to?

A Right after it.

Q Where did you go?

A Over the fence to highway Route 15 which is on the other side of the fence, and I stuck my thumb out and hitchhiked to New York.

Q Where did you go in New York?

A I went to my apartment.

Q And where is that located?

A Four Park Avenue.

Q And when did the F.B.I. Agent come and pick you up?

[58] A The following day.

Q Well when did you arrive in New York?

A Early in the morning, late that night.

Q October 12th?

A Yes.

Q And I believe your testimony was that they came to your apartment on the morning of October 13th, is that correct?

A Right.

Q Did you tell them, or did you deny that you were Ted Grayson?

A When I arrived in New York, I called my lawyer and told him what I had done, and I was waiting for the F.B.I. agents, but I was at home waiting for them to come there, knowing that they would come to my address, of course. And he said not to resist arrest or give them any problems, but not to say anything to them, not to tell them anything. So I didn't say no that is not me. I said I am not saying whether it is me or not. Those are my words.

Q Can you explain in a little more detail what this board with this nail in it looked like?

A It was a piece of pine, light wood. It's about an inch thick, three inches wide, and it had a nail through the center of one end. It was about that long. (Indicating.)

Q And how was Sarge holding it?

[59] A Above his head.

Q Did he make a motion to strike you?

A No, he didn't. He held it above his head and motioned me to get off my bed.

MR. HUMPHREY: I have nothing further, your Honor.

THE COURT: All right.

You will have cross examination, Mr. Nagle?

MR. NAGLE: Yes, your Honor.

THE COURT: Well we are past our recess time. We will take, since there are 14 members of this jury, a little longer than usual. We will take a 15 minute recess, and at the end of that time, will you please be back in the jury box.

(Short recess.)

MR. HUMPHREY: I would request to open up direct, your Honor, for just two additional questions concerning events which occurred after October 11th which I forgot to ask on direct examination.

THE COURT: Any objections?

MR. NAGLE: No, your Honor.

THE COURT: Very well.

T. R. Grayson, recalled.

DIRECT EXAMINATION CONTINUED

BY MR. HUMPHREY:

Q Mr. Grayson, did the F.B.I. agent who testified [60] this morning transport you from your apartment at Four Park Avenue to ultimately the F.B.I. headquarters?

A Yes sir.

Q And who was driving the automobile?

A The first F.B.I. agent.

Q The younger man, Mr. Petersen?

A Yes.

Q And you were in the back seat with Mr. Bullard?

A Yes.

Q Were you hand cuffed?

A No I wasn't.

MR. HUMPHREY: That's all.

MR. NAGLE: Your Honor, may we approach the bench?

THE COURT: Yes.

(At side bar.)

MR. NAGLE: Your Honor, I propose to question this witness on his credibility as to his prior conviction, a felony which is a conviction in this state, a violation of Title 21, United States Code 841 (a) (1), which is distribution of controlled substances, on the issue of credibility.

THE COURT: Any objections?

MR. HUMPHREY: Yes, I object. I think that is the type of crime that is not concerned with dishonesty. I don't think it goes to a person's [61] credibility. I think it would be more prejudicial than helpful in impeaching credibility. And on those grounds I would object pursuant to the rule of evidence that controls in this case.

THE COURT: My concern is that the conference report to Rule 609 states in the very last sentence thereof—and I am reading only part of the sentence—"such evidence should only be excluded where it presents a danger of persuading the trier of fact to convict the defendant on the basis of his prior criminal record."

It is my view that honesty or dishonesty, although it might properly be the test, is not the test in light of Rule 609 as enacted and as interpreted by that conference report.

Consequently we will permit the document. It is my view that the evidence of the prior commitment does not present a danger of persuading the jury to convict this Defendant on the basis of his prior criminal record. The

probative value of admitting the evidence of the prior conviction outweighs the prejudicial effect to this Defendant.

All right.

(In open court.)

[62] CROSS EXAMINATION

BY MR. NAGLE:

Q Mr. Grayson, August 22, 1975, you were convicted in the United States District Court for the Eastern District of New York, is that right?

A Yes.

Q And you were convicted of a violation of Title 21, USC 841 (a) (1), which is distribution of controlled substances, commonly known as drugs?

A I don't know if it is commonly known as drugs, but controlled substances, yes.

Q Controlled substance is a technical term?

A Yes.

Q And you received a sentence of three years with a parole eligibility anytime, is that correct?

A Yes sir.

Q You were serving that sentence at Allenwood at the time you left?

A That's true, sir.

Q You say this other inmate who threatened you was Barnes? Was his first name Alex?

A Yes.

Q Would you describe his physical appearance? Is he black or white?

A I saw him today here in the Court house when I was [63] coming in. I remembered him as being taller than as I saw him now. That perhaps was because of the pressure I was under from him. He is very broad. He's got very large bicepts.

Q Is he a black man?

A Yes he is.

Q You remember him as being taller than he actually is?

A I do, yes.

Q So that do you remember anything else differently today?

A No sir. I knew at that time that he was a Korean Army Sergeant and got in trouble with the Government.

Q When did you have this game, poker game, in which you lost the cigarettes?

A Approximately three weeks prior to the day that I ran.

Q Three weeks is 21 days, is that correct?

A Yes.

Q So that would be about the 20th of September?

A Approximately, sir.

Q And when did you tell us that Barnes first started pressing you about this debt?

A The 9th of October.

Q The 9th of October. Didn't you tell us there was pressure put on you as much as two weeks before?

[64] What happened two weeks before?

A The first of those two weeks I paid him three and a half cartons of cigarettes.

Q What?

A I paid him three and a half cartons of cigarettes. The following week I depleted my balance in the commissary and paid him further.

Q On September 30 you withdrew $31.80 from your commissary account, is that correct?

A Yes.

Q That left you a balance of $8.45, is that correct?

A Yes.

Q On or about September 26th you had asked that funds that you had on deposit in the Metropolitan Correctional Center in New York be transferred, didn't you?

A Yes I did.

Q And they were eventually transferred?

A I didn't know that until I saw the document that your office requested for my commissary account. While I was at Allenwood, those funds never arrived.

Q You had over $500 coming to you?
A Yes I did.
Q And you had asked that that be transferred?
A Yes.
[65] Q You had started the mechanics of the physical transfer of the account from New York to Allenwood?
A As I understand it, it is automatic, but I had put in a request to, you know, to find out where my funds were and when they were arriving. Yes I did put the mechanics into effect.
Q You knew that the money would be arriving?
A Yes sir.
Q At least you had reason to believe it would arrive?
A It was my money.
Q Pardon?
A It was my money.
Q You would expect that when you order a transfer of your funds from one account to another, it would be made?
A Yes, I fully expected to have the funds in my account to pay my debt to this Alexander Barnes.
Q So that on October 11, 1975, the date you left the camp, your actual balance in the Allenwood account was depleted?
A I think I had six cents.
Q But you knew that you had over $500 coming to you in the near future?
A Yes I did.
Q That is as soon as the paper work was completed?
[66] A Yes I did.
Q Did you tell Mr. Barnes anything about this, this substantial sum of money?
A I told Mr. Barnes that I would pay him the cigarettes. The pressure, two days before I left when he pressured me against the wall, he was asking for cash, not the cigarettes. Had that not become the situation, I don't think there would have been any problem. When my funds arrived, I would have paid him the cigarettes.
Q The rules of this poker game were for betting of cigarettes?
A Yes it was.

Q So that cash wasn't used in the institution?
A No it wasn't. As I understood the game it was for cigarettes.
Q The inmates were playing the game and were betting or winning or losing cigarettes?
A Correct.
Q Is this something that was understood by the inmates in the game?
A Sir, I hadn't been in the institution very long, and—
Q We're not talking about this particular game.
A As I understood it while I was playing cards.
THE COURT: Just a second, you were both talking at once.
[67] Did you get the question?
REPORTER: Yes, your Honor. I think so.
THE COURT: Well let's read what you've got and then we will start over.

(The record was read.)

THE WITNESS: That was the situation.

BY MR. NAGLE:

Q You knew that the game was being played for cigarettes and not cash?
A Yes.
Q How many other inmates took part in this game besides you and Barnes?
A The part of the game where I was in debt, which would represent two other people other than Barnes and myself.
Q And how many spectators attended the game?
A None.
Q None?
A Not standing around looking, no.
Q How many other poker games had you been in up to and prior to the 11th of October at the Allenwood prison camp where this same format took place?
A Two games, the same people.
Q And it was always the same?
A It was all under the same rules, yes.

Q So that when Barnes made a demand on you of cash, [68] he was going beyond the rules of the game, is that correct?

A Yes he was.

Q Did you talk to any of the other inmates about this? Did you complain that he was changing the rules of the game after the game was played?

A Did I discuss it with other inmates?

Q Any other inmates?

A No sir.

Q You said you did not report this to the people in authority because you were afraid you would be seen, is that correct?

A There were many reasons. I was involved with gambling, which is a violation of a minor rule in Allenwood. Nobody that I know has ever been caught for it. It is known. It is done openly.

Q What happens when an inmate at Allenwood is caught gambling?

A I don't know of any inmate being caught for gambling and prosecuted by the authorities there for gambling.

Q Did you ever go to anyone in authority about any other matters during your short stay at Allenwood?

A I had requested a transfer to the Metropolitan Correction Center in New York.

Q That was in September?

A Yes.

[69] Q And October 1, 1975, you were caught in your bed instead of going to work, is that correct?

MR. HUMPHREY: Your Honor, I object to this. I don't think this is relevant to the crime charged in the indictment.

THE COURT: What is your comment?

MR. NAGLE: I'm not saying it is relevant to the crime charged in the indictment, I think it is relevant to the issue of whether of not the Defendant could have gone to an officer. He had been before the IDC on at least one occasion in the same month.

THE COURT: Well I don't understand. Is it your view that he could have reported it to an officer when he was not working, or something like that?

MR. NAGLE: Without making a display he could have reported it, your Honor.

THE COURT: All right. I will over rule the objection. You may answer the question.

BY MR. NAGLE:

Q You did not get out of bed on October 1 and on October 2 in time to get to work, is that correct?

A Now that you stated the question differently, yes.

Q And you were charged with an administrative violation of not going to work on time?

A No, not appearing for the count. My job had just [70] been changed from 8 o'clock in the morning to a 4 o'clock in the morning job. I was not notified, and as a result I was not there.

Q So you were charged with a violation of the rules of the institution, not a criminal charge.

A Correct.

Q A rule infraction?

A Correct.

Q And you appeared before an institution disciplinary committee, did you not?

A Yes I did.

Q You appeared before them on October 3, 1975?

A Yes I did.

Q Just eight days before this incident?

A October 3rd, yes.

Q You didn't tell them then about any problems you had with any inmates, did you?

A I realize that I am under oath, and of course I will tell you the truth at any rate, I do believe that I phrased the rhetorical question to Captain Kurd, who was in charge of that, and I think I said something if an inmate was being threatened by somebody, what would you do, what would he do? First of all he said he would want to know who it was.

Q Who said this?

A Captain Kurd. I got the impression that we would [71] have, both of us, would have been called in front of Captain Kurd and questioned about the incident.

Q Are you sure it was Captain Kurd?

A I'm not even sure the conversation took place, to be honest, sir. The situation has been very pressing.

Q Isn't it true that that particular conversation did not take place?

A Pardon?

Q Isn't it true, sir, that that conversation you just testified to did not take place?

A It very well might be true, yes.

Q Pardon?

A It might be true, yes.

Q It might be?

A Yes.

THE COURT: I don't understand the answer, Mr. Nagle, primarily because the question had a negative in it. I don't know whether it means that it might be true that the conversation did not take place or it might be true that it did take place. Would you please ask him the question without a negative in it?

BY MR. NAGLE:

Q You say it might be true that the conversation you just testified—

A Yes sir, in reflecting after I left Allenwood.

[72] Q Pardon?

A In reflecting upon thinking about, you know, what I did when I left Allenwood and could I have handled it another way, I might have just thought that I could have done that and could have asked him and what the consequences would have been, what the action that would have been taken would have been; and perhaps the conversation did not take place and that it is just the result of being emotionally upset about the whole incident.

MR. NAGLE: I will mark this document as Government exhibit No. 3 and show it to counsel for the Defendant.

BY MR. NAGLE:

Q I show you what has been marked for identification as Government exhibit 3. This is an incident report dated October 1, 1975, is it not, regarding you?

A Yes, it appears to be.

(Incident report dated 10/1/75—produced and marked for identification as Government exhibit No. 3.)

BY MR. NAGLE:

Q Under section 17 it says, "comments of inmate to committee regarding above incident" it says, "Grayson claims he is working too many hours a day and he can't get any sleep at night due to noisy dormatory."

[73] Is that what you told the committee?

A I don't know how to answer that. I don't remember what I told the committee. I remember what the incident was and the truth of the incident is what I related to you about my job being changed, which I am sure in my records, and that fact can be certified.

If that is what is on the report, obviously that is what I said, or that is what the interpretation was. I didn't plead not guilty to that. I said yes I was not at the count because I wasn't. And so that there was no lengthy discussion regarding the incident.

Q Section 23 of this same form dated October 1 says under the heading, "inmate's statement and attitude. Grayson has a good attitude. Grayson stated that the incident is true as written. Grayson also stated that he suffers from sleeping sickness and is one of eight people in the United States who have this sickness." It says, "he asked Mr. Jones to take him off early wake-up and Mr. Jones said that he would. Grayson said he liked the work and would work at night shift somewhere if we would let him."

Is that what you told them, told the committee?

A If it is on that report. I don't remember, sir.

Q Well would you look at this form and see if there is anything on that form anywhere that would indicate that you told them that you were being harrassed or threatened or [74] intiminated by another inmate?

A There is no where on this form where that would be shown.

Q What?

A I did not do that.

Q You did not tell them that?

A No. As I have explained, I did not.
Q You testified earlier that you did.
A No, I did not, sir.
Q Pardon?
A I did not, sir.
Q What did you tell us you told Captain Kurd, Mr. Kurd?
A I said that I think I might have asked him what the situation would be and what action would be taken if that were the situation, if some inmate came to him with that situation.
Q When did you tell Captain Kurd this?
A I said I think, sir.
Q You think?
A Yes.
Q You are not sure?
A No, I am not.
Q Do you think it may not have occurred, too?
A It is very possible.
[75] Q Why are you telling us?
A Because you asked the question.
Q I asked you the question if you told the people on the committee anything about this.
A I think you asked me why I didn't.
Q Pardon?
A I think you asked me why I hadn't.
Q I asked you if you told anyone in this committee that you had your hearing with.
A At that there committee, at that time, no sir, I did not.
Q Now you are telling us you did not say anything to the committee.
A To the committee, no sir.
Q But you did tell us earlier that you thought you told Mr. Kurd that. Mr. Kurd was on the committee?
A Yes, he is also the Captain at the institution.
Q When would you have told Mr. Kurd that if you didn't tell him at the committee meeting?
A Prior to the committee I was in Captain Kurd's office. We discussed several things, my job, the job that I was working at, this incident here. He spoke to me

about my future after I got out of Allenwood. We talked about many things.
Q When did these conversations with Captain Kurd [76] take place?
A I can't remember the date or the time, sir.
Q About what time was it in relation to your walking away from the camp?
A Over a week prior to that.
Q So you were in Captain Kurd's office a week prior to your leaving the camp?
A Yes.
Q But you didn't bother going to the Captain, Captain Kurd, or the control center when you were threatened on the 11th?
A That is quite a bit of time beforehand. I hadn't been threatened.
Q On October 11th you hadn't been threatened?
A No, not at that time and not at this time either.
Q The 11th of October?
A I was threatened that day.
Q The day you left?
A Yes sir.
Q And why didn't you go to the control center or to Captain Kurd then?
A For many reasons. For one, I would have had to be involved with a confrontation between myself and Mr. Barnes. The prison grapevine—as I am sure you are familiar with—is pretty effective. I know of stories of inmates being [77] stabbed for being an informer. I know of stories of inmates being stabbed while they sleep for debts not being paid. There is no security facilities at Allenwood. There is no place that I could have been housed to protect me.
There would have been a compounding of the problem, as I saw it then. I would have been making it worse for myself. I would have been putting myself in more jeopardy.
Q You've heard of transfers for safety reasons, haven't you, safety of the inmate?
A Transfers for safety, yes. When the inmate is in an institution where it has the facilities, such as a seg-

regation facility, they will move him from one part of the institution to another part of the institution. That is under observation. But at Allenwood, Allenwood doesn't have the facilities like that.

Q You could have asked for a transfer until the heat blew off?

A Sir, I asked for a transfer and it had been denied. I had asked for a transfer verbally every week for other reasons, and I had been told no.

Q You were asking for a transfer before this game took place?

A After the game took place.

Q And what was your reason for the transfer after the game?

[78] A After the first request slip that I put in for transfer, which was prior to the game, I didn't give a reason. I just asked Mr. Steppie, the unit counselor for my dormatory, if I could be transferred, if it was possible, that the time had arrived that I could be transferred, and I was told no.

THE COURT: Mr. Nagle, I'm not clear—maybe the jury isn't clear—as to whether by "transfer" the witness means transfer from one dormatory to another or whether he is talking about a transfer from Allenwood Prison Camp to some other institution.

MR. NAGLE: Transfer out of the camp to another institution.

THE COURT: All right.

BY MR. NAGLE:

Q You had asked for a transfer in early September to the Metropolitan Correctional Center?

A In New York, sir, yes sir.

Q In New York to be near your business, didn't you?

A Yes.

Q And they turned that down?

A As I understand it Allenwood didn't turn it down. The MCC wasn't accepting transfers at that time and verbally I requested transfer, the same transfer.

Q Now they turned you down because the Metropolitan Correctional Center was over crowded at that time?

[79] A I understand it is a new institution and they were having difficulties.

Q They were not accepting transfers?

A That's correct.

Q That was in early September, is that correct?

A Yes it was.

Q Now after you received these threats that you are talking about, did you go to anybody and tell them about the threats and suggest that they transfer you?

A Yes I did.

Q Who did you tell that?

A I did not tell anybody about the threats, to answer the first part of your question. On the second part of your question, I did ask for a transfer to MCC.

Q Who did you ask?

A Mr. Steppie.

Q When?

A The week of that problem, and it was probably that Friday.

Q Did you tell him that you were being pressured?

A No I didn't.

Q What did you ask him?

A I said is it possible that I could be transferred?

Q Did you tell him where you wanted to be transferred to?

[80] A I don't recall whether I mentioned it again or not. I don't remember.

Q When did you decide to leave the camp?

A After I was threatened with the stick. I didn't decide; I just ran. I didn't sit down and think about it.

Q You say you didn't take anything with you?

A Yes sir.

Q You just went in your prison clothes?

A Yes.

Q Did you ever change clothing?

A In New York, yes.

Q In New York?

A Yes.

Q You did not leave your clothing on the grounds of the Allenwood Prison Camp?

A No I didn't.

Q Are you familiar with Penny Hill, the term Penny Hill?
A Penny Hill?
Q Yes.
A No sir.
Q Did you meet anybody when you left the camp?
A Did I meet anybody?
Q Yes.
A I hitchhiked.
[81] Q How did you get to New York?
A A truck, a semi-truck.
Q Were you hitchhiking?
A Yes sir.
Q What clothes were you wearing then? Institutional?
A In part. I had a civilian sweater.
Q Institutional clothing has bin numbers on, correct?
A Sure.
THE COURT: Has what?
MR. NAGLE: Bin, b-i-n numbers.
THE COURT: All right.
THE WITNESS: It has laundry numbers, yes.

BY MR. NAGLE:

Q So when you looked at a piece of clothing worn by an inmate, inmates' clothing have bin numbers on and you can identify which inmate it is assigned to by looking at the bin number, can't you?
A Sometimes, yes you can.
Q You did not change clothing before leaving the grounds of the prison camp?
A Before leaving the grounds, no sir, I did not.
Q Where did you depart, from what point of the fence surrounding the camp?
A Just off the other side of the fence. I don't [82] at what point.
Q Did you walk out toward Route 15 or over a hill?
A There is a road that runs backwards from the camp, a dirt road. I just went down the dirt road and came to a fence, went over the fence. I took my jacket

off and I threw that down. That was on the other side of the fence, and then I stuck my thumb out.
Q You took your jacket off?
A Yes.
Q This was at night?
A Yes.
Q In October?
A Yes.
Q And you were going out on the highway to hitch hike?
A Yes.
Q And you took your jacket off?
A Yes.
Q You had no other jacket to wear?
A I had a sweater.
Q You were going all the way to New York without a jacket?
A Well I expected to get a ride. I didn't expect to walk.
Q You expected to hitchhike?
[83] A Yes.
Q You really didn't expect to get all the way to New York with a single ride, did you?
A I didn't think about it. I just stuck my thumb out.
Q Did you go ahead north or south on Route 15?
A North.
Q North?
A Sure.
Q Where did you go to?
A I got a ride to Route 80, I believe it is. I'm not sure. And the person that picked me up—
Q Route 80 is south of Allenwood, is it not?
A I don't know. I stuck my thumb out and somebody picked me up. And I said I was going to New York, and they said they would drop me off at the interstate. They dropped me off at the interstate, and the next ride I got another ride, and they took me to a truck stop. I got off there and I asked a couple of truck drivers to give me a ride to New York. One was going

to Astoria and Queens. And I asked him, and he said yes, and he took me right straight to New York.

Q And you did not take anything with you?

A No, I did not take anything with me.

Q Why didn't you admit your identity when the special agents asked you who you were?

[84] A I called my lawyer as soon as I got to New York, and he said that when they arrest me not to say anything to them, not to resist arrest, not to give them a hard time; to go with them, but not to say anything to them.

Q You wouldn't even identify yourself?

A I didn't say one way or the other.

Q Did you deny who you were?

A No I didn't. I said I am not going to say whether I am Ted Grayson or not, and I was sitting in plain view. I wasn't hiding. I was sitting right in front of them. He had a picture in his hand looking at the picture and me, so it was evident that—

Q You heard Agent Petersen say that you denied that you were Ted Grayson?

A I also heard him say that I wasn't cuffed, and the other agent said that I was.

Q You weren't what?

A That I wasn't handcuffed.

Q You heard him say you deny this that you were Ted Grayson?

A Yes, I guess I did.

Q Did you hear agent Bullard say about the same thing?

A I think he said that I didn't admit to being Ted Grayson. I didn't say no I am not Ted Grayson.

Q Did you hear him testify that you denied you were Ted Grayson?

[85] A As I remember the testimony, he wasn't sure.

Q And you were present in the apartment with several other people, is that correct?

A There were other people in my apartment.

Q And you heard Mr. Petersen say they were uncooperative and would not offer identification.

A I heard him say that.

Q Had you had conversations with them telling them not to reveal your identity?

A No, they knew I was waiting for the F.B.I. to come to the apartment.

Q Well why did you go all the way to New York if you were going to turn yourself in?

A I was scared.

Q Why didn't you go to Lewisburg and turn yourself in?

A I didn't know where to turn myself in. My lawyer is in New York. I know one place that they would look for me was at home. I wasn't going to be jumped on like, you know, for having escaped grabbed, or the possibility of even being shot or anything like that.

MR. NAGLE: No other questions, your Honor.

THE COURT: Any redirect?

MR. HUMPHREY: Yes, your Honor.

REDIRECT EXAMINATION

[86] BY MR. HUMPHREY:

Q Mr. Grayson, there was a question asked whether those in the game understood that the stakes were for cigarettes, and you said that you thought that they were. Do you know what other people understood the game to be, or are you saying that you understood it?

A That is what I understood.

Q Do you know what the other people understood the game to be?

A No I don't.

Q Who were the other people in the game? Do you know who they were?

A I know their first names.

Q Were they friends of Sarge, to your knowledge?

A Yes, they were his hang-out friends. They hung out together.

Q Why is it that you did not discuss the fact that he had reneged on the rules of the game by demanding money?

A With them?

Q Yes.

A They would have gone along with him.

Q Did any of these friends of Sarge ever—were they ever present either on October 9th or October 11th?

A Both times they were there.

Q And specifically which of those times? It is my [87] recollection that you testified to at least three different confrontations on those two dates.

A Yes.

Q Once on October 9th, once on October 11th at about 3:30, or some time in there, and once just before you left?

A Yes.

Q Which of those times were these friends of Sarge present?

A One of them was present all three times, and two of them were present twice.

Q Now you testified that you left your jacket out side the fence, is that correct?

A Yes.

Q What did the jacket look like?

A A large Army jacket.

Q And why did you take that off?

A I felt that it would be conspicuous. I would be right outside the grounds. I might get shot. There were State Troopers, or highway patrol officers that patrol that area. I would have looked to an alert officer of the Law, like somebody who had just run out of Allenwood. I didn't want to get shot or grabbed.

Q Why wouldn't you want to be picked up by a State Trooper at that point?

A The State Trooper had stopped me, then I wouldn't [88] have run. I would have been outside Allenwood.

Q Were you attempting to avoid the State Troopers at that point?

A No, I was right out on the road with my thumb out. I had a civilian sweater that are allowed at Allenwood. I felt my chances of getting a ride standing there looking like a civilian, not looking like dressed in matching shirt and pants.

MR. HUMPHREY: That's all I have, your Honor.

THE COURT: Any recross?

MR. NAGLE: Yes.

RECROSS EXAMINATION

BY MR. NAGLE:

Q You said in your original cross examination you were looking for a place to turn yourself in?

A No sir, I didn't say that.

Q What did you say?

A I said a lot of things, sir. I don't know what you are referring to. Are you referring to whether I was running and trying to avoid serving my sentence? If that is what you are asking, I was not.

Q You told us, as I recall it, you went to New York because your attorney was there and you wanted to find a place to turn yourself in.

MR. HUMPHREY: Your Honor, I don't think that that [89] is what he said at all. I object. Unless we can get the reporter to read back that portion of the transcript, I don't think Mr. Nagle should characterize exactly what he said. I think we could ask him did you say this, Mr. Grayson can then say yes or no.

THE COURT: What is your view, sir?

MR. NAGLE: It is my recollection that that was his answer to one of my questions. And my question right now is directed to where it says there was an effort to hide his identity from the State Police and the highway patrol.

THE COURT: Well, I would prefer not to have the credibility of an Attorney pitted against the credibility of a witness. I will sustain the objection but permit you to ask him whether he said so and so.

MR. NAGLE: Whether he said what?

THE COURT: Whether he said so and so.

BY MR. NAGLE:

Q All right. You did take your jacket off so your identity as an inmate would not be discovered by a highway policeman?

A I was scared, sir. I wasn't thinking.

Q So when you left the camp, you had the intention of not being detected as an inmate.

A Just getting away from Allenwood.

Q You could have carried it on your arm?
[90] A I could have. I didn't stop to think about it. I had no plan.
Q You say all you dropped was your jacket?
A I threw my jacket. And well, I took off what was on top of me, a shirt, a jacket and a sweater underneath the shirt, and I took them off and threw them down.
Q Now we have a shirt and a jacket. First it was a jacket. You told us only just a jacket. Now it is a shirt and a jacket, is that correct?
A I did not say it was only the jacket.
Q What else other than a shirt and a jacket?
A A shirt and a jacket.
Q How about trousers?
A No.
MR. NAGLE: No other questions, your Honor.
THE COURT: All right, you may step down, sir.

(Witness excused.)

• • • •

[91] Now do you wish to call another witness?
MR. HUMPHREY: I would like to put a stipulation on the record first of all.
THE COURT: Is it agreeable with Mr. Nagle?
MR. HUMPHREY: Yes. As I read to you in the hall, Mr. Nagle.
MR. NAGLE: Yes.
MR. HUMPHREY: I request that Mr. Nagle stipulate to the following facts: Records in Defendant's prison file indicate that upon commitment to Allenwood he furnished information indicating that his legal address was 4 Park Avenue, New York, New York.
THE COURT: Is that agreeable?
MR. NAGLE: Yes.
THE COURT: Now do you have another witness?
MR. HUMPHREY: Yes I do.
I will call Mr. Crews.
GREGORY W. CREWS, witness called, being duly sworn, was then examined and testified as follows:

DIRECT EXAMINATION

[92] BY THE COURT:

Q What is your last name?
A Crews.
Q How do you spell it?
A C-r-e-w-s.
Q Your first name?
A Gregory.
Q Do you have a middle initial?
A W.
Q Where do you reside?
A In Lewisburg.
Q What is your occupation?
A I am an Administrative Assistant to the Business Manager at the Allenwood Federal Prison Camp.

BY MR. HUMPHREY:

Q How long have you been employed in your capacity?
A Roughly about three months.
Q What was your occupation on or about October of 1975?
A Official Clerk in charge of the commissary.
Q In that position did you keep any records of the amount of money deposited and withdrawn in the inmate's prison accounts?
A Yes sir.
Q Can you identify this document which I have marked [93] for identification as Defendant Exhibit 1?
A Yes sir.
Q What is that?
A This is a photostatic copy of an inmate ledger card.

(Photostatic copy of inmate's ledger card—produced and marked for identification as Defendant Exhibit No. 1)

BY MR. HUMPHREY:

Q And for what inmate does that card?
A That particular card is for Ted Grayson.

Q And is this document compiled and kept, or was it compiled and kept, by you in the ordinary course of your business at that time?

A Yes sir.

Q Now when are entries made on these cards?

A On the day that they happen.

Q So in other words if there is a deposit in an account one day, it is marked on the ledger sheet, and on the day that there is a withdraw, it is marked, is that correct?

A Yes sir.

Q And do you know whether an inmate is permitted to have cash?

A Absolutely not.

[94] Q And this is the method which the inmates use to purchase goods, is that correct?

A Yes sir.

Q Now drawing your attention to D-1, could you please indicate how many deposits prior to October 11, 1975 there were?

A There were two.

Q And what was the total amount of deposits?

A Fifty dollars.

Q Now how many withdrawals for Mr. Graysons' commissary account were there?

A Four.

Q Can you give the dates and the amounts of each of those withdrawals?

A On September 9 he withdrew $9.40 for commissary purchases.

On September 18th he withdrew .35, and on September 30th he withdrew $31.80. And on October 9th $8.39.

Q Now is there any limit upon the amount of money which an inmate can withdraw from his commissary account?

A Yes sir.

Q What is that limit?

A The limit is $45 in a calendar month.

Q Is there any limit within that month? For example we have on September 30 a withdrawal of $31.80. Is

there any [95] limit as to a single withdrawal, or can he withdraw the whole $45?

A No sir. He could spend it all at one time or he could spread it out over the month.

Q Now is there any indication on this card that after October 11th that certain other money was deposited in Mr. Grayson's prison account?

A Yes.

Q And what was the date of that, and the amount, please?

A On October 21st there was $525.99 deposited to the account.

Q Now let me ask you this: following the $8.39 withdrawal on October 9, what was the balance of Mr. Grayson's account?

A Six cents.

Q And therefore as of October 21 with the deposit of $525.99, his total was $526.05, is that correct?

A That is correct.

Q And was that withdrawn at some point?

A It was withdrawn on the 22nd of October.

Q I know that it is marked under "other withdrawals", there is a W after it. Does that have any significance?

A It just means that it is other withdrawals. In other words it is taken out of his account for his purpose to [96] be sent, or for me to transfer it to him.

Q In other words it was not a commissary purchase?

A No sir.

Q Are you aware of the other regulations concerning commissary purchases that were in effect in September and October of 1975?

A Yes sir.

Q Is there any limit upon the number of cigarettes that inmates can purchase?

A Yes sir.

Q What was that limit?

A Four cartons per.

Q Four cartons per what?

A Per shopping sale. A man can only go to the store once a week. At that particular sale he could buy four cartons, but no more.

Q All right. Do you know if there was any reason for that regulation?

A Nothing other than it was carried over from the Lewisburg Institution, and we limited them to four cartons. That's all I know.

MR. HUMPHREY: Your Honor, I would offer Defendant Exhibit No. 1 into evidence.

THE COURT: Any objection, Mr. Nagle?

MR. NAGLE: What was the offer?

[97] THE COURT: Defendant exhibit No. 1.

MR. NAGLE: No objection.

THE COURT: We will admit it.

(Defendant exhibit No. 1, having been previously identified, was received into evidence.)

MR. HUMPHREY: I have nothing further.

THE COURT: Cross examine?

MR. NAGLE: Yes, your Honor.

CROSS EXAMINATION

BY MR. NAGLE:

Q Mr. Crews, on direct examination you were questioned about exhibit D-1, the ledger sheet in the account of the Defendant, is that correct?

A That is correct.

Q This shows a balance of six cents? What is that date?

A That is October 9.

Q And that was following a withdrawal of $8.45 on the same day, is that correct?

A That's correct.

Q The next entry is a deposit of $525.99?

A That's right.

Q What was the date of that deposit?

[98] A The 21st of October.

Q Do you have any record of the source of that money?

A Yes sir.

Q Where did it come from?

A That money came from New York.

MR. NAGLE: That will be Government Exhibit 4, is that correct, your Honor?

THE COURT: Yes.

BY MR. NAGLE:

Q I show you what has been marked for identification as Government exhibit 4, three zerox copies of documents, is that correct?

A Yes.

Q And what is that first page?

A The first page is CMS 21 transmittal form from the MCC in New York, and the second page is a copy of the back of that 24 transmittal form.

(Transmittal form—produced and marked for identification as Government exhibit No. 4.)

BY MR. NAGLE:

Q On the first page is the reference to the reverse side?

A Yes there is.

[99] Q And what is the last page?

A The last page is a copy of the form 14 which is a receipt.

THE COURT: A what?

THE WITNESS: A receipt for that amount of money of $525.99.

BY MR. NAGLE:

Q And who would have to prepare the first two pages of the original document?

A New York would have been the originating office.

Q Who would have prepared the last of those three pages?

A The mail room officer at our institution.

Q At Allenwood?

A Yes sir.

MR. NAGLE: I will show these documents to counsel for the Defendant.

BY MR. NAGLE:

Q What is the date of the first copy, the one prepared in New York?

A On the first document it would be September 17th.

Q Now what does that represent? What does that date represent?

A It represents the day that this was typed up.

[100] Q How was this transfer request initiated?

A Mr. Grayson, to my recollection, was transferred from the MCC in New York to our institution. This would have been a transmittal of funds that he had at that institution, transmitting it to this institution at Allenwood.

Q Well did Mr. Grayson go to your office and request transfer of these funds, or were they automatic?

A It normally is automatic, but this was done September 17th.

Q Supposedly, yes. Do you know whether Mr. Grayson actually made a request?

A He did. He made, to my recollection, at least two.

Q When were these requests made?

A The dates I cannot tell you, sometime after he came in, and he was admitted sometime around the 29th of August.

Q Did he make the request to you?

A Yes sir, he did.

Q Now how close would it have been to the date that he arrived, the 29th of August? Would it have been a week or a month later? I'm not trying to suggest anything; I'm merely asking you to try to give us an approximate time, an approximate day.

A It was more than likely the early part of September which would have been his first request.

[101] Q It would have been before the 17th?

A I would think so, yes.

Q And when was the second request made?

A That might have been sometime on or after the 18th of September.

Q What did you tell Mr. Grayson regarding the transfer of funds?

A I told him to give it at least two or three weeks to transfer them from New York, and then I would call New York and check on what the hold up was on his funds.

Q Did you call New York?

A Yes I did.

Q Did you report on your results of that call to Mr. Grayson?

A I believe that when he came down the second time, I told him that I had called them.

Q And what did you tell him about it?

A I told him I called New York about his funds and they said they would be transferred down.

Q There was a flood in September of this past year, is that correct?

A That is correct.

Q Did that in any way reflect your recollection as to the time you talked to Grayson?

A I know that he had come down some time during that [102] period and checked with me about his funds, and he had asked, or stated, that he wanted the money for his wife to pay bills with.

MR. NAGLE: Your Honor, I have to take judicial notice of the fact that the flood occurred on the 26th of September.

THE COURT: I know that the Agnes Flood was June 22 of 1972, but I don't know the date of the flood last year, and I don't think it is of such general knowldge that I am in a position to take judicial notice of it. It could easily have been September 14th as far as I am concerned.

BY MR. NAGLE:

Q Now on exhibit D-1 it says $525 was transferred out of your institution eventually.

A Yes.

Q And it was transferred to an institution as to which the Defendant was put after he was apprehended, is that correct?

A According to my recollection, I called the control center at the camp and asked them where Mr. Grayson

had been transferred to, and they told me MCC in New York so immediately the day after I received it, I transferred it back to them.

Q So the credit was only in Lewisburg for a single day or so?

A I believe so. I am not sure of that.

[103] Q Now these documents, Government exhibit 4, are these copies of the original records of your office?

A Yes sir, they are.

Q Is the regular course of business in your office to make and receive these and keep these records?

A Yes sir.

Q And what is your position?

A Right now I am an Administrative Assistant to the Business Manager.

Q And it is part of your duties to maintain custody of these records?

A Yes sir.

Q And are these, Government Exhibit 4, are these genuine copies of the original records of your office?

A Yes they are.

MR. NAGLE: Your Honor, I move for admission into evidence of Government exhibit 4.

THE COURT: Any objections?

MR. HUMPHREY: No, your Honor.

THE COURT: We will admit them.

(Government exhibit No. 4, having been previously identified, was received into evidence.)

MR. NAGLE: That's all, your Honor.

[104] THE COURT: Any redirect?

MR. NAGLE: No, your Honor.

THE COURT: What did you say, Mr. Nagle? I thought you said something?

MR. NAGLE: Mr. Humphrey might have said something.

MR. HUMPHREY: I think Mr. Nagle was asking if the witness may be excused.

THE COURT: I didn't hear it.

Do you have any further questions?

MR. HUMPHREY: No sir.

THE COURT: You may be excused.

(Witness excused.)

• • • •

[107] DAVID M. LEE, witness called being duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q What is your last name?

A Lee, L-e-e.

Q Your first name?

A David.

Q Do you use a middle initial?

A M.

[108] THE COURT: All right.

BY MR. HUMPHREY:

Q Mr. Lee, are you an inmate at the Allenwood Federal Prison Camp?

A Yes I am.

Q And how long have you been an inmate at that camp?

A Since August 28th of last year.

Q 1975?

A Yes.

Q In the period of September and October of 1975 did you know Mr. Ted Grayson, the Defendant in this case?

A Yes.

Q Hod did you know him? Was he a friend of yours?

A The day I went to Allenwood he came in from West Street, and I came in from Danburry, Conn., Federal Penitentiary. And we met where you get your clothes at. As being friends, I just knew him to say how are you, and what's happening and so forth.

Q Did you socialize with him within the prison camp?

A No, not really.

Q Did you know an inmate by the name of Alexander Barnes?

A No I don't.

Q Do you know an inmate whose nickname was Sarge?

[109] A Yes I do.

Q And how did you know Sarge?

A About the same way. I lived there at a small camp with about 400 people. You get to know everybody there.

Q Now it has been stipulated in this case that Mr. Grayson left the Allenwood Prison Camp on October 11, 1975. Prior to that time, did you ever witness any confrontation between Mr. Grayson and this inmate you know as Sarge?

A I know what you're getting at. Yes. I heard Sarge talk to Grayson in a loud voice one day, but that's all. I never seen no harm, no hands or no shuffling whatsoever.

Q Do you know what day it was you heard him talking in a loud voice?

A I believe it was a Saturday.

Q Do you know if it was close to the time that Mr. Grayson left the prison camp?

A I seen Grayson that day, and then I think it was the next day, or the day after, and I heard that he escaped.

Q So it was just before, on the day or just before, the day that he escaped that you—

A I don't know when he escaped, but I heard it was right then that Grayson boogied through the woods.

Q You said you heard them talking in a loud voice. Did you see anything at all? Did you see Mr. Grayson and Sarge?

[110] A I seen several people.

Q Who else did you see besides Mr. Grayson and Sarge?

A Like I said, I seen several people. I couldn't tell you who they were because I wasn't paying any attention. If someone gets in a beef, that's their problem. I just kept on walking when they were talking loud, minding my own business.

Q Where was it you saw these several people, Sarge and Mr. Grayson?

A In Dorm 5 and 6.

Q Where abouts in Dorm 5 and 6?

A As soon as you go in the door.

Q And about what time of the day was that?

A I believe it was around a little after three. I believe I had a visit that day. That's where I was going to 5 and 6 after the visit.

Q Did you hear any of the words being said?

A I didn't pay any attention. When I came in, you couldn't help but seeing them because they were right in front of you, and like I didn't stay there for the conversation but what drew my attention was the loud talking, but I kept on walking.

Q Who was doing the loud talking?

A I couldn't really say who was doing the loud talk-

[111] ing; but if I said it sounded like a black guy, you know, black guys usually have a—you can usually tell the way they talk—but there was more than one black guy there, so I couldn't say who it was.

Q Of the men standing there, other than Mr. Grayson, how many white guys were there and how many black guys?

A Just Grayson was the only white guy.

Q And do you know how many black guys there were standing there?

A I couldn't say, six or five or four, but there were more than two. There was a few. Like I say, it was like you are going through a door and you look in and see that you don't count. You couldn't see what they were wearing or what how many there was, like I say, when I came through the door they were there and I just kept on walking.

Q You say it was loud. You heard loud voices. Was it an argument-type of thing? Can you characterize the type of conversation that was being held or the type of words being said?

A No.

Q It was loud, however?

A Yes, it was loud.

Q And did you hesitate to, or stop at all to see what was happening?

A No.

[112] Q Isn't this the type of thing that would warrant your attention?

A I look after Dave up there. I don't look after nobody else.

MR. HUMPHREY: Nothing further.

THE COURT: Cross examine?

MR. NAGLE: No questions, your Honor.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Do you have another witness, Mr. Humphrey?

MR. HUMPHREY: No, your Honor. The Defense rests.

• • • •

[113] ALEX B. BARNES, witness called being duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q What is your last name?
A Barnes.
Q B-a-r-n-e-s?
A Yes sir.
Q Your first name?
A Alex.
Q A-l-e-x?
A Yes.
Q Do you use a middle initial?
A Yes, B.
Q Is your nickname Sarge?
A That is what quite a few people call me, sir.

THE COURT: All right, Mr. Nagle.

BY MR. NAGLE:

Q Mr. Barnes, do you know the Defendant, Ted Grayson?

A Yes sir, I have seen him in camp.

[114] Q And were you an inmate at the Federal Prison Camp in Allenwood in October of 1975?

A Yes sir, I was.
Q Are you an inmate now?
A No sir, I'm not.
Q When did you stop being an inmate?
A January 6th of this year, sir.
Q Were you paroled or were you released at the end of your sentence?
A I was paroled, sir.
Q Mr. Barnes, you were convicted in the United States District Court for the Western District of Kentucky on October 17, 1974, is that correct?
A Yes, sir.
Q And the offense for which you were convicted was a violation of Title 21 Section 841 (a) (1), which would be a violation of distributing a controlled substance, referred to as drugs?
A Yes sir.
Q You received a five year sentence on that, is that correct.
A No sir. Four years.
Q Excuse me. You are right. Four years.

What prior convictions or felonies have you suffered in the past other than that one?

[115] A None what so ever.
Q Now when did you come to Allenwood, approximately?
A I believe it was in July, approximately July 15th or 1975.
Q And you stayed there until January 6th of 1976?
A Yes sir.
Q Then you were released on parole?
A Yes sir.
Q Now Mr. Barnes, do you play cards?
A Yes sir.
Q Poker?
A Yes sir.
Q At the prison camp did you ever play poker with the Defendant?
A No sir.

Q Did you ever play cards with the Defendant?
A Yes sir.
Q What kind of cards did you play?
A Spades, Hearts.
Q What were the stakes, if any?
A We didn't have any—25 pushups.
Q What?
A Twenty five pushups.
Q Twenty five cigarettes?
THE COURT: He didn't say cigarettes. He said [116] twenty five pushups.

BY MR. NAGLE:

Q Twenty five pushups.
A Yes.
Q Excuse me, that's a physical exercise, is that correct?
A Yes sir.
Q And you did not play for anything of value like cigarettes or money?
A No sir.
Q Do you owe the Defendant any money?
A No sir.
Q Did the Defendant owe you any money?
A No sir.
Q When did you play cards with the Defendant?
A I can't truthfully say right off hand. We used to play every night. A group of us would get together.
Q Did you ever have a fight with the Defendant?
A No sir.
Q Did you ever threaten the Defendant?
A No sir.
Q The Defendant testified in this case that you were the dealer in a poker game, and that he lost 40 cartons of cigarettes.
A No sir.
[117] Q He did not? You were not in that game?
A No sir.
Q Did you ever see the Defendant gambling?
A No sir.

Q Did you ever go into his dorm?
A Yes sir.
Q What dormitory did you live in? And in what dormatory did he live in?
A He lived in 5, I lived in 6, the same building, right next door, the two joining together.
Q Did you ever pick up a board and threaten him with a board?
A No sir.
Q Did you ever have a loud argument with the Defendant?
A No sir.
Q Did you ever speak loudly around the Defendant?
A I may have spoke loudly around him, but I speak loudly quite often through force of habit. Being in cells a lot of times, I would talk loudly.
Q And do you know Mr. Lee, the previous witness?
A Yes sir. I have seen him in and out of the camp.
Q Did he talk to you at all lately about this case?
A Yes sir. He talked to me and Mr. Miller, one of the inmates—excuse me—one of the guards—and quite a [118] few other people there.
Q What did he tell you about this case?
A He had got into some trouble and was sent up to Union County. And upon his return from Union County he had said he ran into Grayson there and Grayson had asked him to be a witness for him, stating that he had seen me hit him and threaten him. He told me this. He told Mr. Miller this, one of the guards there.
He said that he had to appear in Court because he was going to be subpoenaed by Grayson's attorney.
Q Does the Defendant owe you anything?
A No sir.
Q Do you owe the Defendant anything?
A No sir.
Q Did you ever threaten, or in any way, threaten the Defendant?
A No sir.
Q Did you ever lift your arm or anything that could be considered a weapon towards the Defendant?
A No sir.

Q Did anybody in your presence do that?
A No sir.
MR. NAGLE: No other questions your Honor.
THE COURT: Cross examine?
MR. NAGLE: May I ask one more question?
[119] THE COURT: Do you have any objection, Mr. Humphrey?
MR. HUMPHREY: Pardon me?
THE COURT: Any objection?
MR. HUMPHREY: I'm sorry. I didn't hear what he said.
THE COURT: He said he released the witness too soon and he has at least one more question.
MR. HUMPHREY: No objection.
THE COURT: All right.

BY MR. NAGLE:

Q When did I speak to you for the first time?
A I believe it was last week on the telephone.
Q And was it late last week, the last week of January or the first week of February?
A It was I think the first week of February. I'm not too sure.
MR. NAGLE: Thank you. That's all.

CROSS EXAMINATION

BY MR. HUMPHREY:

Q When was it that Mr. Lee came up and engaged in a conversation with you that you just testified about?
A I think it was approximately about three weeks to a month before I was released for parole.
Q You were paroled January 6th?
[120] A Yes.
Q So it was three weeks to a month, somewhere between December 6th and January 6th?
A I believe so, sir. I can't say for sure.
Q And where did he talk to you? Where did he approach you?
A In the dormatory.

Q Do you reside in the same dormatory?
A No we don't.
Q Did he come into your dorm?
A Yes he did.
Q And who was with you at that time?
A I was actually by myself, but there was some more people around.
Q And again what did he state to you?
A He said that Grayson had approached him and asked him to be a witness for him. Stating that I had threatened him, and he had seen me jump on him, and that he would be subpoenaed to appear in court.
Q Did he tell you that he was going to testify in favor of Grayson?
A He said that he was going to tell the truth, that he hadn't seen me jump on Grayson or heard me Threaten him.
Q Did he tell you that he was going to testify that he saw you and Grayson, or saw you and several other [121] inmates, gather around Grayson and talking in a very loud manner.
A No, he didn't.
Q When Mr. Grayson walked off at Allenwood, was that fairly well known around the prison camp? Does that kind of thing get around?
A Yes sir.
Q You were aware of it about the time that it happened?
A Yes sir.
Q On the day that it happened, or on two days previous, did you have any arguments with Mr. Grayson?
A No I didn't, sir.
Q At that time did you ever confront him with other inmates near the doorway of dormatory 5 and 6?
A No sir.
Q You never played any card games for stakes other than pushups with Mr. Grayson, is that correct?
A Right.
Q And what was the game that you did play with Mr. Grayson?
A Spades and hearts.

Q What is spakes? Just briefly what kind of game is it?

A It's like spakes is trump, and the object of the [122] game is to get 150 points. The one who gets 150 points first wins.

Q And hearts is the same, similar to spades?

A Right.

Q Now do you ever play poker with anyone at Allenwood?

A Yes sir. I played poker with some of the guys down there.

Q Do you ever play for stakes rather than pushups?

A No sir. Very seldom. We play for a pack of cigarettes, one or two cigarettes.

MR. HUMPHREY: Nothing further.

MR. NAGLE: Your Honor, may the witness be excused?

THE COURT: Do you have any other questions?

MR. NAGLE: No, your Honor.

THE COURT: Yes, you may be excused.

(Witness excused.)

MR. NAGLE: I will call Mr. Ressler.

WALTER N. RESSLER, witness called, being duly sworn, examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q Your last name?

A Ressler.

Q R-e-s-s-l-e-r?

[123] A Yes sir.

Q And your first name?

A Walter.

Q Do you use a middle initial?

A N.

Q Where do you live?

A Northumberland.

Q Are you a correctional officer?

A Correctional counselor.

Q Where?

A Allenwood.

Q And how long have you been in that position?

A Three years.

BY MR. NAGLE:

Q Mr. Ressler, you are employed as a correctional officer and correctional counselor on October 12, 1975?

A Yes sir.

Q And what was your shift that date?

A Day work, acting Lieutenant.

Q What were your duties?

A What was I doing?

Q Yes?

A Well at the time I went out I started to shake-down the fence area in regard to this man leaving.

Q Are you talking about the Defendant, Ted Grayson?

[124] A Yes sir.

Q Shaking down the fence area. What did you do? This fence runs for many miles, doesn't it?

A Yes. I started out, naturally, as close to the barricks or dormatory as possible.

Q And did you go in a vehicle?

A Yes. Then got out and walked so far, and then proceeded that way.

Q Is there an area of the Allenwood Camp known as Penny Hill?

A Yes sir.

Q When you got there, what did you find with regard to the fence?

A Right up on, let's say it would have been the South side of Penny Hill near the top, there was what I noticed mostly a break in the fence, a big break that cattle or anything could go through.

Q How high is the fence?

A There is a chain link fence, I would say it is six feet high. Then on top of that there is possibly six strands of barbed wire, someplaces three strands.

Q Was it as tall as I am or taller?
A I would say it was as tall as you or taller.
Q And where was the break in the fence?
A From the chain link fence down it was torn, like
[125] flattened out. You could almost step over it.
Q Could you go through the hole?
A With the clothing I have on now, I could step through it.
Q The same as you are dressed now?
A Yes.
Q What did you have to do to walk through that hole?
A I just stepped over and walked through it and went over through the brush.
Q You didn't have to climb over the fence?
A Oh no.
Q Now how often, and for what reason is this fence checked for holes like that?
A Well it is checked practically every day by the cattle detail officers.
Q Why is that?
A On account of the cattle naturally getting out on highway Route 15, or any place else out of the area that they are not supposed to be.
Q How far is Highway 15 from this point?
A That particular area right to the berm of the road I would probably say 25 or 30 yards, you know, to the fence. Then there is a little brush.
Q Can you see highway Route 15 from the fence?
A Yes.
[126] Q Can you see the fence from highway 15?
A Yes. That particular little section, yes.
Q I think you said you went through the fence. What did you find in the area outside the fence?
A Well within about an area of 5 yards of the berm where the cars could pull off in a clump of bushes I found this bundle of clothing, but they were scattered, which I picked up.
Q Does that include this belt, sir?
A Yes sir.

MR. NAGLE: Do you have a marking pen, your Honor?
THE COURT: Try this one. If it won't show, we will get something else.
MR. NAGLE: I think it's showing fine, your Honor.

BY MR. NAGLE:

Q Now Mr. Ressler, I have marked for identification this object as Government exhibit 5.1 and this appears to be a jacket, is that correct?
A Yes.

(jacket, produced and marked for identification as Government exhibit No. 5.1)

BY MR. NAGLE:

Q Is this a Government issued jacket?
A Yes.
Q Issued to inmates?
[127] A Yes.
Q How are you able to identify it?
A I would go by this here, this thing in here.
Q Are you talking about the label inside the collar?
A Yes. This is government issue clothing and we get a lot of this surplus.
Q Surplus Army clothing?
A Yes.
Q I show you Government exhibit 5.2 which has been marked for identification. Tell us what that is.
A This is our clothing, and it is a bin numbered article.
THE COURT: Would you please identify what it is. I know what you have in your hands, but the record won't show it.

BY MR. NAGLE:

Q Is this a kaki shirt?
A Yes, this is a kaki shirt. Then it has a bin number in the bottom. These are the clothing that are assigned to the inmates when they get there.

(Kaki shirt—produced and marked for identification as Government exhibit No. 5.2)

BY MR. NAGLE:

Q What is the bin number on the shirt, Government [128] exhibit No. 5.2?
A It is number 323.
Q Three-two-three. That is the bin number?
A Yes.
Q What is a bin number?
A A bin number is a number that has been assigned to a man's clothing when he gets there, and he keeps that as long as he is there. It is stamped. When they go through the laundry, they are brought out and they are sorted out. Three-two-three bin would be his bin.
Q Now when clothing gets changed from one inmate to another and there is a bin number on it, what happens?
A The bin numbers are blocked out.
Q I show you Government exhibit 5.3. This is a pair of trousers, right? Now this, as you see here, is blocked out.

(Kaki trousers—produced and marked for identification as Government exhibit No. 5.3.)

BY MR. NAGLE:

Q There were bin numbers on there?
A Yes, and the size is inside there stamped in, and this pair here is a pair which would be classified as work clothing, and would have no bin numbers in these.
Q There are no bin numbers on work clothing?
[129] A No.
Q I show you Government exhibit 5.4, a belt, is that correct?
A Yes. This is a regulation belt. We give these to many of these—these aren't even marked. We don't mark them.

(Belt—produced and marked for identification as Government exhibit No. 5.4.)

BY MR. NAGLE:

Q Now I show you Government exhibit marked for identification as 5.5 which is a memorandum written by you, is that correct?
A That's correct.

(Memo by Mr. Ressler—produced and marked for identification as Government exhibit No. 5.5.)

BY MR. NAGLE:

Q Now are Government exhibits 5.1 through 5.4 the clothing that you found outside the hole in the chain link fence on Penny Hill?
A They are.
Q Is that the clothing?
A Yes.
Q What did you do with it after you found it?
A Took it in, naturally shook it down, the clothing, [130] checked the bin number. I called Mr. Miller about the bin number in the shirt. He stated that it was—
Q Well, don't answer what he stated.
A Well then I proceeded to wrap it up and put it in the vault.
Q You did what?
A I wrapped it up. I brought it in here and put it in our vault.
Q And you picked it up again today from the vault?
A And I picked it up again today from the vault and I brought it in here.
Q And Government exhibit 5.5, the memorandum, when did you write that memo?
A Ten/twelve/seventy-five.
Q When?
A Ten/twelve/seventy-five.
Q When did you find the clothing? The same day or another day?
A Let's see? Yes.
Q The same day?
A Yes.
MR. NAGLE: I show the entire exhibit to counsel for the Defendant, your Honor.

I move for the admission of Government exhibits 5.1 through 5.5 inclusive and I pass the witness, your Honor.

[131] THE COURT: All right.

Any objection, Mr. Humphrey?

MR. HUMPHREY: I would prefer to question the witness first.

THE COURT: All right. We will withhold the ruling on the exhibits until after the witness is ready to step down.

CROSS EXAMINATION

BY MR. HUMPHREY:

Q Mr. Ressler, what of this clothing is marked with Mr. Grayson's bin number?

A The shirt has a bin number on it.

Q Is that the only thing that is marked with his bin number?

A Yes.

Q Well this memorandum from you that the attached clothing is suspected belonging to Ted Grayson marked with bin number 323, the bin number marking applies only to the shirt, is that correct?

A That would pertain to that.

Q Now why aren't the pants marked with a bin number?

A That particular pair of pants was work clothing.

Q How do you know it was work clothing?

A By the way it is stamped out. Everything is marked out but the size.

[132] Q Who would wear this kind of work clothing?

A Just about anybody would when the need work clothing.

Q Does anybody who worked wear that kind of clothing?

A On outside details, yes.

Q Is a record kept as to whether or not an inmate would have those particular kind of work pants?

A Not the work clothing, no, not on that particular work clothing, there would be no record.

Q Is there any particular reason why it is not marked with a bin number?

A Is there any particular reason?

Q Why they don't mark the work pants with a bin number?

A Yes. Because usually they have some of the men wear them down like in the garage and they are real dirty. They are usually old clothing to begin with, and they are really dirty, and what have you. And then they end up throwing them away.

Q Does an inmate keep the same issue of work clothing, or when it gets dirty throw it away, or does he get another pair or a different pair?

A Generally the work clothing is turned in and it is laundered and sorted out by size and then sent to the details [133] by size so they could get it back again, but they wouldn't know which it was. They get it just by size.

Q They would get the work clothing then from the details that they were working at?

A From the clothing room officer, he would have handled it. The clothing room officer would handle it.

MR. HUMPHREY: No further questions. And I have no objections to the exhibits.

THE COURT: All right, Mr. Nagle, any redirect? I will admit all those exhibits, Government exhibits 5.1 thru 5.5.

(Government exhibits 5.1 through 5.5, having been previously identified, were received into evidence.)

REDIRECT EXAMINATION

BY MR. NAGLE:

Q Mr. Ressler, were these clothing, where you found them, where you first saw them, were they separated by any spaces, or were they all in one place?

MR. HUMPHREY: Your Honor, I object. I think that is beyond the scope of cross examination. I didn't ask any questions of that type.

THE COURT: What is your comment on that?

MR. NAGLE: He asked questions about this shirt [134] being the only one having a bin number, your Honor.

THE COURT: I know, but what did he bring up on cross examination new which would permit you to ask where the clothing were strewn?

MR. NAGLE: Well, your Honor, I object to that statement of being strewn. I think my question is actually repetative. I think the first thing he said was it was all in a pile in a bush.

THE COURT: Well all right. I may have misunderstood. I thought that is what Mr. Humphrey said. I will sustain the objection because I don't think this related to any new matter which he brought up.

MR. NAGLE: I think the witness has already covered this once anyway.

THE COURT: Well he probably has.

MR. NAGLE: That's all I have, your Honor.

THE COURT: You may be excused.

(Witness excused.)

MR. NAGLE: I will call Mr. Miller.

IVAN G. MILLER, JR., witness called, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q Your last name is Miller?
A Yes.
[135] Q And your first name?
A Ivan.
Q And do you use a middle initial?
A G, and Jr.
Q Where do you reside?
A Mifflinburg, Pa.
Q What is your occupation?
A I am an MA Correctional Officer at the Federal Prison Camp.
Q And how long have you had that position?
A I think it is approximately two years.

Q Approximately two years?
A Yes.

BY MR. NAGLE:

Q Now Mr. Miller, do you have any duties in your job regarding clothing issues at the Allenwood Prison Camp?
A Yes sir.
Q Were you in charge of that in October of 1975?
A Yes sir.
Q And are you in charge of it now?
A I beg your pardon?
Q Are you in charge of that now?
A I am, yes.
Q Are you familiar with the term bin number?
A Yes sir, I am.
[136] Q What does the term bin number mean?
A Every resident who comes in there is given a bin number; so that when their clothes are washed, that the clothes get back to that inmate.
Q Is there any record?
A Yes, I keep a record in this book.
Q Now I show you Government exhibit 5.2, a shirt which has been admitted into evidence, and on the inside of the shirtail, the number 323 appears. What is that?
A That is the bin number given to an inmate marked by our machine.
Q Can you tell us in October of 1975 to whom that bin number was assigned?
A That bin number was assigned to T. Grayson, 00209 on 8/29.
Q T. Grayson, is that the Defendant?
A Yes sir.
MR. NAGLE: No other questions, your Honor.
THE COURT: Mr. Humphrey?

CROSS EXAMINATION

BY MR. HUMPHREY:

Q I was a little bit inattentive when you first began testifying. Are you in charge of the clothing issue?
A Correct.

Q What items of clothing do you mark with a bin number?

[137] A We usually mark all kakis and the kaki shirts and trousers. We send all our laundry to Lewisburg.

Q Yes.

A If a man doesn't get his trousers back, sometimes they are a month before they come back. He will come in and tell me he has no trousers, and I will tell him we will give him some out of the mark-out bin which we have no numbers on.

Q Do you keep a record of who gets that type of clothing?

A No. That is all work clothing.

Q You have a record of who does not get their clothing back from the Lewisburg laundry?

A No. If I go to that, I would spend all my time keeping records.

Q Do you know if Ted Grayson was given this pair of work pants?

A I can't say he was, no I can't say he was.

Q Are these work pants?

A They are.

Q How do you know?

A Well, here you see all these numbers here are marked out. When they are marked out that means the man went home.

BY THE COURT:

Q It means what?

[138] A He went home, your Honor.

Then the size is also stamped on the machine. So anyone who has no trousers, we will pull these out of the bin and give these to him till the clothes come back from Lewisburg.

BY MR. HUMPHREY:

Q Now those who work also wear these work trousers?

A Everyone wears them, kakis and also greens.

Q How do they get them for work?

A They get them from the clothing room.

Q And is it anybody who has a job at Allenwood gets these?

A Anyone who is in the camp. They all get their clothes from there.

Q And do all people in the camp who are in some work detail wear these type of work pants?

A Oh yes, the whole camp either wears kakais or greens.

Q How about those in the kitchen, what do they wear?

A They wear white. The kitchen and the hospital wear whites.

MR. HUMPHREY: That's all.

MR. NAGLE: That's all I have of this witness.

THE COURT: You may step down.

(Witness excused.)

MR. NAGLE: May the last two witnesses be excused?

[139] THE COURT: Yes.

MR. NAGLE: I will call Mr. Curd.

THOMAS G. KURD, witness called, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q Your last name?

A Curd.

Q C-u-r-d?

A Yes sir.

Q Your first name?

A Thomas.

Q Do you use a middle initial?

A G.

Q Where do you reside?

A In Lewisburg.

Q What is your occupation?

A I am a Chief Correctional Supervisor at Allenwood.

Q How long have you had that position?

A About a year.

THE COURT: Thank you.

BY MR. NAGLE:

Q Mr. Curd, as Chief Correctional Supervisor, you are on occasion referred to as Captain Curd?

A That's right.

[140] Q And you are in charge of all the custodial officers at the Allenwood Camp, is that correct?

A That's correct.

Q And do you know the Defendant, d Grayson?

A Yes sir.

Q Was he an inmate there up until October 11, 1975?

A Yes sir.

Q Did he appear before you as a member of the institution disciplinary committee on or about the 1st of October, 1975? And I show you what has been marked for identification as Government exhibit 3.

A I don't believe he appeared on this report here. This report here was handled at the UDC level. I think there was a following report within a couple of days.

BY THE COURT: What is the UDC level?

A Well, we have two disciplinary committees there. Any minor sanction can be handled by a supervisor in charge of the shift, which is what happened in this case here. He was just warned and reprimanded for not being to work on time.

If it is a repeated action, something that happens again, or maybe a couple more times, at this time the supervisor will refer it to the institution disciplinary committee which has three people sitting on that committee. And at this time they hear the case.

Q What is the UDC?

[141] A It stands for a unit disciplinary committee.

BY MR. NAGLE:

Q I show you what has been marked for identification as Government exhibit 3.1. This is the institutional disciplinary committee form is that right?

A Right.

(Disciplinary committee report of UDC—produced and marked for identification as Government exhibit 3.1.)

BY MR. NAGLE:

Now that, along with Government exhibit 3, contains a block for the statement by the inmate, is that correct?

A Right.

Q And did you serve on that institutional disciplinary committee on October 3, 1975?

A Yes I did.

Q Did the Defendant appear before your committee?

A Yes sir.

Q This was regarding his failure to get up on time and respond to some command?

A Yes sir.

Q What did he tell your committee that day? Well let me change the question: did he tell your committee that he was [142] any way being intimidated or threatened by any other inmates?

A No sir.

Q Did you ever have meetings with the Defendant in your office prior to his escape?

A Yes sir.

Q And during what period of time were the meetings held?

A It was usually for some kind of an infraction of the regulations of some kind, usually just a warning about being late for work or something of this nature.

Q And how close to the date of his escape was your last meeting with him in your office, approximately?

A Maybe two weeks.

Q Did he ever make any statement in your presence which would indicate in any way that he was concerned about threats from other inmates?

A No sir.

Q If he did, what would you have done?

A Well, if he told us that he was being threatened and was scared, we would have to either remove him from the population or maybe try to transfer him to another place for his protection.

Q You would have taken some affirmative action?

A Yes sir.

Q Did he ever make such a complaint to you?

[143] A No.

Q Did he ever imply to you that that might be the case?

A In no way.

Q Do you remember the escape incident involved in this case? Do you remember the day of the escape?

A Not very well, no.
Q Do you know whether any other inmates escaped during that same day?
A I don't believe so.

BY THE COURT:

Q What do you mean you don't believe so? You don't know or you don't believe—
A I don't know.

BY MR. NAGLE:

Q Are you familiar with the visitors' record log in the penitentiary?
A Yes sir.
Q The document I show you, is that the visitors' log, not the penitentiary log—let me ask it this way: the visitors' log for the Allenwood Prison Camp?
A Yes sir.
MR. HUMPHREY: You Honor, I object to this. I don't think it is proper rebuttal at this point. I don't see anything that we brought up in our case which would warrant any [144] type of rebuttal concerning visiting records.
THE COURT: What do you propose to do?
MR. HUMPHREY: May we approach the bench on this?
THE COURT: Yes.

(At Side bar.)

MR. NAGLE: This would show that he had regular visits from his wife who gave her address as many different places, none of them 4 Park Avenue. It also shows that he had visits from his wife on October 7th, October 8th and October 9th. Two days before October 9 was two days within his escape. He had people he could have communicated with for two reasons: one, if he had been threatened, she could have gotten him help, more likely that she met him on the highway at the break in the fence with a change of clothing. That's all I have on that your Honor.
THE COURT: Well I see most of it, but I'm not positive that this evidence tends to show that there was

premeditation with the escape, and it wasn't the result of being threatened that day? Is that what you are saying?
MR. NAGLE: It wasn't an emergency thing that he had to leave on that day.
THE COURT: What is your comment on that, [145] Mr. Humphrey?
MR. HUMPHREY: There wasn't what, an emergency?
MR. NAGLE: He claims it was an emergency, such an emergency that he just ran and didn't take anything with him.
MR. HUMPHREY: I don't think this shows anything except that he received visits three days, the 7th, the 8th and the 9th.
MR. NAGLE: This also shows addresses at 135 Water Street, 60 South Cottage Street, 20 Seaside Boulevard, 20-3 Seaside Boulevard. That's it.
THE COURT: I will over rule the objection.

(In open court.)

BY MR. NAGLE:

Q You have identified this as the visitors' log at the Allenwood Prison Camp as to the Defendant?
A Yes sir.
Q Now on the left hand side there is a document. What is that document?
A This is the list of authorized visitors.
Q What is the first entry there?
A Cathy Newman, wife, 4 Park Avenue, New York.
Q And the next one?
[146] A Ed Mueller, business associate, 4 Park avenue, New York.
Q Then there are other entries with other names and other addresses, is that correct?
A Right.
Q Now go to the right side. What are these documents?
A This is the date that they had visits.
Q Does it show the name of the visitors and the relationship?
A Yes.

Q What is the top one?
A C. Grayson, wife, 135 Water Street.
Q W. Water Street?
A W. Water Street, right.
Q What was the date of that visit?
A 10/7/75.
Q What is the next one?
THE COURT: Before you leave that, what community is indicated there?
MR. NAGLE: No community is indicated, your Honor.
THE COURT: All right.

BY MR. NAGLE:

Q What is the next one? What is the date?
A 10/8/ C. Grayson.
[147] Q What is the address there?
A 135 W. Water Street.
Q There is no Community. Is there a State?
A Yes. Maryland.
Q Maryland? Is that right?
A Right.
Q Not New York?
A Not New York.
Q The next visit he had was, there was one on the 7th, one on the 8th, and what is the next one?
A The 9th. And it looks like 60 S. Cottage Street, in Maryland.
Q Now how many visits of his wife did he have that is shown by this entire file?
A Twenty six.
Q Any of the addresses supplied at the time of his wife's visit as 4 Park Avenue, or are they all different addresses?
A Well—
Q There is one address 20-3 Seaside Boulevard, is that correct?
A Yes, 20-3 Seaside Boulevard. There is no state. Well here it is, the state is Maryland. And it looks like that is the only other difference.
Q There is 135?

[148] A Well I have already given that one, so I've already given the 135.
Q So that the Defendant had a visit from a woman identifying herself as his wife on the 7th, the 8th and the 9th of October, 1975, is that correct?
A Yes sir.
Q She furnished an address other than 4 Park Avenue, New York, New York?
A Yes.
MR. NAGLE: No other questions, your Honor.
THE COURT: Cross examine?
MR. NAGLE: For the record, I will move for the admission of Government exhibit 3.1 and Government exhibit 3, 3.1 being the original record. It will have to be copied, and I also ask that the visitor's log be marked as Government exhibit G6. Is that the next number, your Honor?
THE COURT: Yes.

BY MR. NAGLE:

Q Now Mr. Curd, I show you what has been marked as Government exhibit G6. This is the entire visitors' log regarding the Defendant at Allenwood Prison Camp, is that correct?
A Yes sir.
MR. NAGLE: I move for the admission into evidence of G-6. The witness had already testified to it. This is [149] merely for record purposes.
THE COURT: Do you object to that, Mr. Humphrey?
MR. HUMPHREY: No sir.
THE COURT: We will admit that. What about G3.1 which is the disciplinary report?
MR. HUMPHREY: No I don't object to it.
THE COURT: We will admit both of them.

(Government exhibit 3.1, having been previously identified, was received into evidence.)

(Government exhibit 6, visitors' log-produced, marked for identification and received into evidence.)

MR. NAGLE: Has G-3 been admitted?
THE COURT: No, it has not.

MR. NAGLE: I would move for the admission of Government exhibit 3.

THE COURT: Any objection to that? G-3 is the incident report of October 1, 1975.

MR. HUMPHREY: What am I looking at here?

MR. NAGLE: That is G-3.

MR. HUMPHREY: And what is the other one?

MR. NAGLE: G3.1 is the IDC report.

MR. HUMPHREY: No objection.

[150] THE COURT: All right. We will admit Government exhibit 3.

(Government exhibit 3, having been previously identified, was received into evidence.)

CROSS EXAMINATION

BY MR. HUMPHREY:

Q Captain Curd, this state on this visiting sheet says Maryland. Does that indicate that Maryland is the license plate of the car?

A Yes sir.

Q So whoever that visitor was did not say that she resided in Maryland, then, is that correct?

A No sir. It just says the car that she is driving has a Maryland license tag on it.

Q All right. What is Penny Hill?

A That is the hill directly behind the buildings. The buildings set on the side of Penny Hill, the dormatory.

Q Is Penny Hill near the road or Route 15?

A Yes, one end of it is.

MR. NAGLE: This question of Penny Hill is well beyond the scope of my direct examination. That was discussed with Mr. Ressler.

MR. HUMPHREY: I don't believe I am confined to the scope of his direct examination, your Honor.

[151] THE COURT: We will permit inquiry into the matters beyond the subject matter of the direct examination as if on direct.

BY MR. HUMPHREY:

Q Is Penny Hill fairly famous among those at Allenwood as a drop-off point for contraband coming in and out of the camp?

A Yes sir.

Q On this disciplinary report what was the incident with which he was charged?

A Failure to report to work and stand count.

Q And what count did he fail to stand? When did he fail to report to work and where?

A He failed to report to work in the kitchen, and the count was shortly after five.

Q Do you know whether or not Mr. Grayson worked in the kitchen?

A Yes he did.

MR. HUMPHREY: That's all I have, your Honor.

THE COURT: Anything further?

REDIRECT EXAMINATION

BY MR. NAGLE:

Q Mr. Curd, you are the Chief Correctional Supervisor, in charge of security, is that correct?

A Yes.

[152] Q You testified on cross examination about Penny Hill being a drop-off spot for contraband coming into the institution, is that correct?

A Yes sir.

Q Well, if that is true, is there any special precaution taken to search that area on a daily basis?

A Not daily, no. But periodically, yes we do have stake outs every so often, especially around the holidays and at times that we suspect that there will be a large amount of contraband coming in.

Q If there are any holes in the fence which are found, what is done about the hole?

A We usually try to keep it repaired.

Q How quickly?

A It could be anywhere from a week to two months.

Q Does it take that long?
A It could.
MR. NAGLE: No other questions.
THE COURT: Any recross?
MR. HUMPHREY: Yes sir.

RECROSS EXAMINATION

BY MR. HUMPHREY:

Q Captain, is it a fairly easy matter for an inmate to climb the fence to get out?
A Yes sir.
[153] MR. HUMPHREY: That's all.

BY THE COURT:

Q What is the post office address for the Allenwood Prison Camp?
A I don't really know.
Q Well do you know how mail is addressed to the prison camp?
A Please repeat the question.
Q Do you know how mail is addressed to the prison camp?
A Just Allenwood, Montgomery Federal Prison Camp, Montgomery, Pa.
Q Montgomery, Pa. Is that the postal address for the prison camp, Montgomery?
A Yes sir.
Q All right. Is there a West Water Street in Montgomery?
A I don't know, sir. Let me explain something to you: I am fairly new in this part of the country, and I have never written a letter to the camp.
Q But do you get mail there?
A Yes sir.
Q Is is addressed to you at Montgomery?
A I think it is addressed either Montgomery or in some instances it seems like I've seen Allenwood/Montgomery.

[154] Q The post office is at Montgomery?
A Yes sir.
THE COURT: Do you have any cross examination with respect to the Court's questions, Mr. Humphrey?
MR. HUMPHREY: No, your Honor.
MR. NAGLE: No, your Honor. I think the box number is Box 1000, Montgomery, Pa.
THE COURT: All right. You may step down.

(Witness excused.)

MR. NAGLE: I will call Mr. Steppie.
JOHN J. STEPPIE, witness called, being duly sworn was examined and testified as follows:

BY THE COURT:

Q What is your last name?
A Steppie.
Q S-t-e-p-p-i-e?
A Yes.
Q Your first name?
A John.
Q Do you use a middle initial?
A J.
Q Where do you reside?
A Watsontown, Pa.
Q What is your occupation?
A I am a Correctional Treatment Specialist at the
[155] Allenwood Federal Prison Camp.
Q And how long have you had that position?
A I've been employed there since February of 1973.
Q I don't know what a Correctional Specialist Treatment is. Will you illuminate me?
A Basically we provide a host of social services to a given number of people on a case load.
Q Would it be fair to say that you are a social service case worker assigned to the prison camp and in the pay of the United States?
A Yes it would be.
THE COURT: All right.

BY MR. NAGLE:

Q Now Mr. Steppie, on October 1975 the Defendant was on your case load as a case worker, is that correct?

A Yes sir, he was.

Q You know the Defendant?

A Yes.

Q Was he in your case load when you first arrived in August of 1975?

A Yes sir, I believe he was.

Q And shortly after he arrived, did he come to your office regarding the request for a transfer?

A Yes sir, he did.

Q What did he ask for?

A I believe Mr. Grayson asked for a transfer to the [156] Metropolitan Correction Center in New York City so that he could be closer to his wife or his girlfriend, either one.

Q Were you able to work that out?

A No sir, we were not. We processed his request through the classification committee, and we learned that because the facility had been opened not too many months prior to that, that they were already over-crowded and they were not accepting anyone, to be transferred to that institution.

So as a result we told Mr. Grayson this was the case; and just as soon as they were accepting people into that facility, we would work his request up again.

Q When was this decision not to transfer him made?

A Well without looking at the files, I don't recall.

Q Would it have been early or mid September, 1975?

A I would think so, sir. I would think so, yes.

Q Do you recall any events around the date of the escape in this case that he walked out of the camp on the 11th of October, 1975?

A No sir. I was quite surprised to hear that he had taken off, that he had escaped.

Q Prior to that time, closer to that time, did he—other than the one incident you just spoke of—did he talk to you again about a transfer?

A Yes sir. Mr. Grayson talked to me several times about transferring. Prior to going up to the committee

and [157] following his denial by the committee, he did talk to us about transfer, yes.

Q What did he say? Why did he want to transfer?

A Well I believe the reason was he wanted to be closer to his common law wife, girlfriend, because she was having problems in the community, and this way it would have been easier for her to visit with him, being that she was from the New York City area if he was at the MCC in New York.

Q Did he tell you anything about any absolute emergency situation requiring an immediate exiting from Allenwood?

A I kind of recall that, sir, yes sir. He said it was —but exactly what the emergency was, I don't recall.

Q Where was the emergency supposed to have been?

A I believe it was with his common law wife.

Q And did he get a transfer then?

A No sir.

Q Did he ever talk to you about any adverse pressure against him by anyone at Allenwood?

A No sir, he did not.

Q Did he ever tell you that anyone was threatening him in any way?

A No sir, he did not.

Q If he had, as a case worker, what action would you have taken?

[158] A Well the procedure is to verify the information to see if there is in fact a threat against a man's safety; and if that proves to be the case, then we usually transfer him to another institution.

Q But you would have taken some affirmative action if he reported to you any threat or force against him?

A Yes, we would have, but again Mr. Grayson did not tell me specifically that his safety was in jeopardy.

Q He did tell you there was some emergency in New York?

A Yes, concerning his common law wife.

MR. NAGLE: No other questions.

THE COURT: Mr. Humphrey?

MR. HUMPHREY: Yes sir.

CROSS EXAMINATION

BY MR. HUMPHREY:

Q When was the last time Mr. Grayson talked to you about his transfer?

A Specifically, sir, I can't recall, but I do know that he spoke to us about this frequently after coming into the camp.

Q Now you mentioned his wife, his girlfriend, his common law wife. Is this all one person?

A Yes sir.

Q And do you know whether or not she is his wife or [159] his girlfriend, or what?

A No, no sir I do not know.

Q What did Mr. Grayson tell you about it?

A I believe he said that the lady was his wife, and the information we had revealed that she was female acquaintance he had met prior to coming into his sentence.

Q Were you aware that this woman was living in the area of the Allenwood prison camp.

A Yes sir, I was aware of that.

Q Did Mr. Grayson ever talk to you about any problems that she was having in the community?

A Not in the Allenwood community, no sir.

Q Did he ever inform you that she had been flooded out of the place where she was staying in Muncy, Pennsylvania?

A Not that I can recall, sir.

Q Now after the first—

THE COURT: Just a second. I will take judicial notice that 135 West Water Street, Muncy, was completely under water during the flood of this last fall. The water was probably up about eight feet deep at that point.

BY MR. HUMPHREY:

Q Mr. Steppie, the first time Mr. Grayson talked to you about a transfer was on a request slip, and your response, or his request and your response, was made a part of his central file, is that correct?

[160] A Not exactly, sir. The first time he spoke to me about it was prior to his putting in the request in writing which we had requested of him.

Q Now other than his request in writing that he makes, do you make any notation of oral requests for transfer that he makes to you?

A No sir. We would have to receive his request in writing. The only exception would be in an emergency situation and then of course we would go on the basis of the man's verbal request.

Q So the fact that he may have talked to you five or six times, or several times, about a transfer, would not necessarily show up in his central file?

A No sir.

Q You would have no written record of what exactly his request was, is that correct?

A Well I was aware of what his request was because we had spoken about his request for a transfer on a number of occasions. As a result I asked Ted to put it in writing so we could put it before the classification committee who would then vote on it.

Q All right. Now in the occasion when an inmate comes to you in one of your case loads and says that he is being threatened, is there any type of investigation that is conducted, or do you just accept his word and transfer him [161] out right away.

A No sir, there is an investigation involved.

MR. HUMPHREY: I have nothing further, your Honor.

THE COURT: Do you have anything else, Mr. Nagle?

MR. NAGLE: May we approach the bench, your Honor?

THE COURT: Yes.

(At side bar.)

MR. NAGLE: Earlier I asked your Honor to take judicial notice that the flood occurred September 26th.

THE COURT: But I don't know that. I can't do it because I don't know it.

MR. NAGLE: You have taken judicial notice very infaticaly that 135 West Water Street is in Muncy.

THE COURT: Absolutely. I know that. That is generally known.

MR. NAGLE: I don't know that.

THE COURT: Well, that's too bad. This is in the community, but I don't know when that flood occurred. We could probably reconstruct it. I know that we were hearing the Bryan Case in Lewisburg, but it is hard for me to know—I just simply don't know that date. I wouldn't know, frankly, whether it was September or October, which [162] one it was.

MR. NAGLE: It was in September because you were up here.

THE COURT: That's quite right. Well do you know when the flood was Mr. Humphrey?

MR. HUMPHREY: No sir. I don't have any great objection if he knows for a fact that it was September.

MR. NAGLE: I don't want this jury thinking that there was a flood emergency on October 11th.

THE COURT: All right. If you precisely know when the flood was.

Do you know when it was?

THE LAW CLERK: I agree with Mr. Nagle. It was the 26th.

THE COURT: All right then I will take judicial notice of it then.

MR. HUMPHREY: The 26th, was that the Friday that we helped take the furniture out?

THE LAW CLERK: Yes, Mr. Humphrey, September 26th is a Friday.

THE COURT: Well let's see. All right. I have figured it out. It was a Friday. All right.

MR. HUMPHREY: Your Honor, I'd like to request to have a short surrebuttal. There are [163] certain new matters which were brought up, but I'd like a 10 minute recess after the Government closes mainly not only to talk to the witness but to my client.

THE COURT: Well we won't adjourn without giving you a chance to raise it.

Anything else?

MR. NAGLE: Your Honor, you are going to take juricial notice of that?

THE COURT: Yes.

MR. HUMPHREY: I have no other questions.

THE COURT: All right.

(In open court.)

THE COURT: Now it has been agreed by counsel that the flood did occur on Friday, September 26th 1975.

Is that correct?

MR. HUMPHREY: That would be the first day of that flood.

THE COURT: All right. Well I know that it did. We will let it go at that.

Now before you step down, I'm going to direct the jury to disregard the appelation of common law wife or girlfriend that phrase that was used by Mr. Steppie. I do not think it is proper to inject that into this case, and I do not want to have the jury prejudice the Defendant because of that [164] phrase. In my view it clearly should not be used in this case, and I direct you to disregard it.

All right. You may step down sir.

(Witness excused.)

MR. NAGLE: Your Honor, there was no request in that regard, in the comment the Court just made.

THE COURT: Well I have seen this happen before, and it occurs every now and then in pre-sentence reports. And I think governmental agents ought to refrain from doing it. The modality of this country is changing. Do you have anything else?

MR. HUMPHREY: No, your Honor.

THE COURT: All right.

Do you have surrebuttal?

MR. HUMPHREY: Yes, your Honor.

• • • •

[170] D. M. LEE, recalled.

DIRECT EXAMINATION

BY MR. HUMPHREY:

Q Mr. Lee, prior to today, how many times have you spoken with me?

A Once.

THE COURT: What do you mean, have you spoken? Is that all you said?

MR. HUMPHREY: I said have you spoken with me.

THE COURT: All right. I didn't hear that.

BY MR. HUMPHREY:

Q Was that at the Allenwood Prison Camp?

A Yes sir.

Q Did I interview you concerning this alleged escape?

A You rapped with me about Grayson, yeah.

Q Did you ever talk to Sarge about your testifying in this case?

A Yes.

Q And could you tell us what took place, please?

A I seen Sarge in 5 and 6 dormatory. That's where he slept. And when I went over to his bed and we were talking [171] and got to talking to me being in the Union County Jail where I was at for a shot that I got, he asked me if Grayson was there. And I said yes.

He asked me did I have a conversation with him. I told him yeah and what went down. This is what I told him. I said I seen Grayson in Union County Jail, and, you know, that he gave himself up after he ran, Sarge. Sarge said I didn't know that. I said he did.

And another thing, he was supposed to have run because of you threatening him. And he said that's a bunch of bull, or whatever, you know.

I said I don't know regarding anything to that, Sarge, but I told him and I want to tell you, too. So I don't want to get in the middle. I am going to Court and tell them what I seen.

But Grayson asked me if I saw you—which I was talking to Sarge—did I see Sarge beat him up.

And I said I'm going to tell them no, Sarge, because I didn't see that.

And Sarge said, well, you just tell the truth.

And that's what I have done right here today.

Q Did you tell Sarge you were going to testify that you saw he and several other inmates in a loud conversation with Grayson?

MR. NAGLE: Your Honor, counsel has a habit of standing between me and the witness. I wish he would stand [172] at the side.

THE COURT: I can't hear what you are saying.

MR. NAGLE: Counsel has a habit of standing between me and the witness, and I wish he would stand aside.

THE COURT: All right.

BY MR. HUMPHREY:

Q Did you tell Sarge that you were going to testify to what you testified to here today?

A Yes.

Q And what you testified to what in fact you saw on this particular day?

A I didn't say what I was going to testify to. I said when I go to Court and testify, if I have to go, I hope I won't, I am going to tell the truth. I didn't say —lead Sarge out of the way on anything—you know. I didn't say this is what I'm going to say because I didn't know what I was going to say because I didn't know what I was going to be asked.

Q And your testimony here earlier, the first time you testified, is that in fact what you saw on this particular day?

A Yes.

MR. HUMPHREY: I have nothing further.

THE COURT: Any questions, Mr. Nagle?

CROSS EXAMINATION

[173] BY MR. NAGLE:

Q Did you see Mr. Alex Barnes threaten the Defendant?

A Is that Sarge, Alex Barnes, is that Sarge?

Q Yes.

A No I didn't.

Q Did anyone ask you to testify to that?

A Can I do what?

Q Did the Defendant ask you to come into Court and say Sarge, or Alex Barnes, threatened him or beat him up?
A He didn't ask me to come in Court and say that.
Q He asked you to do what?
A He didn't ask me to come in Court and say that.
Q Did he ask you to say it to anybody?
A No he didn't.
Q Did he tell you what happened?
A Yes he did.
Q And you came here under a compulsory process, issued by Defense Counsel?
A I don't know how I got here.
Q The United States Marshall brought you here?
A I took that into consideration. I know how I got here, but I don't know what the process was how I got here.

MR. NAGLE: Your Honor, I'd like the Court to take judicial notice that the witness is here under a writ issued by the Court at the request of Defense counsel.

[174] THE COURT: Well I don't think I can take judicial notice of that.

MR. NAGLE: It is part of the record.

THE COURT: It may be part of the record, but that isn't what you take judicial notice of as far as I know, I take judicial notice of facts which are so well known in a community that they don't have to be proven, and scientific facts which are so susceptible of direct proof by examination of a tretis that they don't have to be proven.

No I have no doubt that the two of you can agree that the witness, Mr. Lee, is here under a subpoena and an order issued by this Court. If you want to agree to that, that's fine.

MR. HUMPHREY: I would agree to that, your Honor, and Mr. Nagle.

MR. NAGLE: Thank you, your Honor.

THE COURT: Do you have anything else?

MR. NAGLE: No other questions.

THE COURT: Any redirect?

MR. HUMPHREY: No, your Honor.

THE COURT: All right. You may step down.

(Witness excused.)

THE COURT: Do you have any further surrebuttal?

MR. HUMPHREY: Yes. Mr. Grayson.

• • • •

[176] T. R. GRAYSON, re-called.

DIRECT EXAMINATION

BY MR. HUMPHREY:

Q Mr. Grayson, there has been introduced into evidence various visitors' slips, and I would like to show you these. Here is the one for October 7th, C. Grayson, wife, 135 W. Water Street, 10/8/75, C. Grayson, wife, 135 W. Water Street, 10/9/75. C. Grayson, wife, 60 South Cottage Street, and there are others in here from C. Grayson at 135 West Water Street address. And there is also some from C. Grayson, 20 Seaside Boulevard.

There's also some C. Newman, relationship, Grayson, wife, 20-3 Seaside Boulevard. Is this the same person, C. Grayson and C. Newman?
A Yes.
Q Who is that?

[177] A A girlfriend of mine.
Q What is her name?
A Cathy Newman.
Q Is she your wife?
A No she is not.
Q And do you know, did she sign the visitors' slip as your wife?
A She did.
Q Do you know why?
A She told me that she thought that when she first visited that was the first thing she had written down. The first time she first visited she wrote our relationship that she was my wife. And the reason she did it she wanted to make sure that she would be able to see me.

Q And what was your relationship with Cathy Newman?

A I met her a month after I was separated from my wife, and we lived together.

Q How long had you been living with Miss Newman?

A A year. Our relationship is over a year.

Q Now there are these various addresses here. Do you know where 20-3 Seaside Boulevard is?

A That's Miss Ann Newman's address, Cathy's mother.

Q And where is that located?

A It's in Staton Island, New York.

Q And where is 135 West Water Street?

[178] A In Muncy.

Q And did Cathy Newman reside at 135 West Water St. in Muncy?

A She did.

Q And did she reside with anybody?

A She resided with the wife of another inmate at Allenwood.

Q And how long did she stay at 135 West Water Street?

A She was there from the second week in September when she moved up to Muncy from Staton Island until the day of the flood.

Q And was her apartment or her residence involved in the flood? Was it flooded out?

A Yes, she was evacuated. The whole building was evacuated.

Q Do you know who her landlord was?

A Mr. Parsones.

Q Who is he?

A The industrial supervisor at Allenwood Camp.

Q And where did she go after the flood?

A She applied to HUD, which is some urban development organization that helps flood victims, and they put her and Mrs. Capetowitz—I think her name is—that is Lee's wife.

Q Is this the inmate's wife that you have been [179] talking about?

A Yes. Some good samaritan in town gave them a residence. I think it was in a farm or at a farm until HUD was able to locate another apartment for them.

Q Do you know what address she used while she was at this farm house or this good samaratin's house?

A She continued to use 135 Water Street because that was her mailing address.

Q And did she eventually get another address some place?

A She got an apartment. HUD found her an apartmeit and the cottage on the south Cottage Street, I think it is.

MR. HUMPHREY: That's all I have, your Honor.

THE COURT: Any cross, Mr. Nagle?

CROSS EXAMINATION

BY MR. NAGLE:

Q You say this woman who signed in as C. Grayson, wife of you, had visits with you on the 7th, the 8th and 9th of October?

A Yes.

Q And she visited you regularly, is that correct?

A She did. She moved up to Muncy and visited me daily.

Q On September 26th, the day of the flood, you had a visit from C. Newman, Grayson's wife, is that correct, 9/26/75; [180] and also 9/25/75?

A Yes, that is correct. I am just seeing where she put the first address.

Q 9/25/75 she was living at 20-3 Seaside Boulevard.

A On 9/6/75 she was at 135 Water Street. She used this address back and forth between where she was living and her mother's address where she grew up.

Q The 25th s[illegible] used 20-3 Seaside Boulevard?

A Yes.

Q And then the 26th—

A The same address. And also the 6th.

Q And the 28th, two days later, Seaside Boulevard address and then on the 30th Seaside Boulevard address, is that correct?

A Yes.

Q Who is C. Newman Grayson?

A She is my girlfriend.

Q And who is Helen Capetowitz?

A That is the girl that she was sharing her apartment with.

Q Is she also known as your wife?

A No, she was visiting Lee Capetowitz, the roommate. I don't know what that is doing in that file, in my file. That is a mistake.

Q Apparently misfiled, is that correct?

[181] MR. NAGLE: That's all I have, your Honor.

THE COURT: All right. Thank you.

MR. HUMPHREY: Nothing further.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Do you rest?

MR. HUMPHREY: Yes sir.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Criminal No. 75-221

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

TED R. GRAYSON, DEFENDANT.

Williamsport, Pa.
March 12, 1976

BEFORE: HONORABLE MALCOLM MUIR.

SENTENCING

[2] THE COURT: You may proceed.

MR. NAGLE: Your Honor, this is the time for the sentencing of the case of United States of America vs. Ted R. Grayson, Criminal No. 75-221.

You, sir, are Ted R. Grayson, the Defendant named in the indictment filed in this Court to Criminal No. 75-221?

THE DEFENDANT: Yes, I am.

MR. NAGLE: And you are here represented in Open Court by your Court-appointed counsel, Attorney John M. Humphrey, is that correct?

THE DEFENDANT: Yes.

MR. NAGLE: Your Honor, this Defendant was charged by indictment on November 21, 1975 with escape by leaving the Allenwood Prison Camp. He was arraigned on December 2, 1975 and entered a plea of Not Guilty. The case was set for trial commencing on the January list. The case was tried on February 5 and February 6, 1976, and resulted in a verdict of Guilty. The Government now moves for sentencing.

The jury was selected, I believe, Your Honor, on January 6; but because of the extensive trial work the Court had at that period of time, the case was reached February 5.

THE COURT: Mr. Humphrey, have you received a copy of the Pre-sentence Report?

MR. HUMPHREY: Yes, Your Honor.

THE COURT: Have you had an opportunity to discuss [3] it fully with Mr. Grayson?

MR. HUMPHREY: Yes, Your Honor.

THE COURT: Do you know of any reason why sentence should not be imposed at this time, Mr. Humphrey?

MR. HUMPHREY: No, I do not, Your Honor.

THE COURT: Mr. Grayson, is there any reason you know of why sentence should not be imposed at this time?

THE DEFENDANT: No.

THE COURT: Mr. Humphrey, is there anything you wish to say in your client's behalf, or is there any information you wish to present to the Court by way of mitigation of punishment?

MR. HUMPHREY: Just a very few comments, Your Honor: Mr. Grayson, of course, went to trial in this case with the defense of coercion. He was convicted; and for what reason it is not entirly clear, but apparently the jury did not believe his story, or portions of it. The only thing I would like to say is that whatever was the reason that Mr. Grayson left Allenwood, it is clear, and I think that the evidence which was introduced at trial, would indicate that it was not with the purpose of forever trying to avoid the Federal authorities. He did apparently go straight to his legal residence as given to the Allenwood authorities and was there when the F.B.I. agents arrived.

We ask this Court to consider this fact when you impose sentence.

THE COURT: Mr. Grayson, do you have anything you [4] wish to say in your own behalf, or is there any information you wish to present to this Court in mitigation of punishment?

THE DEFENDANT: No, Your Honor.

THE COURT: Mr. Nagle, do you have any comments prior to sentencing?

MR. NAGLE: No, Your Honor.

THE COURT: All right. I'm going to give my reasons for sentencing in this case with clarity, because one of the reasons may well be considered by a Court of Appeals to be impermissible; and although I could come into this Court Room and sentence this Defendant to a five-year prison term without any explanation at all; I think it is fair that I give the reasons so that if the Court of Appeals feels that one of the reasons which I am about to enunciate is an improper consideration for a trial judge, then the Court will be in a position to reverse this Court and send the case back for re-sentencing.

In my view a prison sentence is indicated, and the sentence that the Court is going to impose is to deter you, Mr. Grayson, and others who are similarily situated. Secondly, it is my view that your defense was a complete fabrication without the slightest merit whatsoever. I feel it is proper for me to consider that fact in the sentencing, and I will do so.

The following is the sentence of the Court: It is adjudged that the Defendant is hereby committed to the custody of the Attorney General for two years—I'm sorry, I said the [4-A] custody of the Attorney General—or his authorized representative for imprisonment for a period of two years. The sentence shall begin at the expiration of any sentence or sentences the Defendant is now serving or for which he is being held.

You have the right to appeal this sentence, Mr. Grayson; and if you are unable to pay the costs of it, the Government will pay the costs together with your counsel fees.

That concludes this matter.

SUPREME COURT OF THE UNITED STATES

No. 76-1572

UNITED STATES, PETITIONER,

v.

TED R. GRAYSON

ORDER ALLOWING CERTIORARI

Filed October 3, 1977

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 249420 01

RECEIVED
JUL 29 1977
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1572

UNITED STATES OF AMERICA, PETITIONER

vs.

TED R. GRAYSON

ON PETITION FOR A WRIT OF CERTIORARI TOTHE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

John M. Humphrey, Esquire
23 West Third Street
Williamsport, PA 17701

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question Presented	1
Statement	2
Argument	4
Conclusion	8

CITATIONS

Cases:

Hess v. U.S., 496 F. 2d 936, 939 (C.A. 8) 4, 5, 6

Humes v. United States, 186 F. 2d 875 (C.A. 10) 5

Monrosa v. Carbon Black, Inc., 359 U.S. 180 (1959) 8

Scott v. United States, 419 F. 2d 264, 268-269 (C.A.D.C.) 4

United States v. Cluchette, 465 F. 2d 749, 754-755 (C.A. 9) 4, 5

United States v. Hendrix, 505 F. 2d 1233 (C.A. 2), certiorari denied, 423 U.S. 897 ..... 4, 6

United States v. Levine, 372 F. 2d 70, 74 (C.A. 7), certiorari denied, 388 U.S. 916 5

United States v. Moore, 484, F. 2d 1284, 1287 (C.A. 4) 4, 5

United States v. Nunn, 525 F. 2d 958 (C.A. 5) 4

United States v. Wallace, 418 F. 2d 876, 878 (C.A. 6), certiorari denied, 397 U.S. 955 ..... 4, 5, 6

Statutes:

18 U.S.C. Section 751(a) 3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1572

UNITED STATES OF AMERICA, PETITIONER

vs.

TED R. GRAYSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The original judgment order of the panel (App. D, of Petition, 35a-36a) is not reported. The opinion of the panel on rehearing (App. A, of Petition, 1a-31a) is reported at 550 F. 2d 103.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The question presented is adequately set forth in the Petition.

STATEMENT

Respondent has no disagreement with the Statement in the Petition. However, it is necessary to set forth certain additional facts concerning the trial in this case.

At trial, Respondent admitted walking off of the Allenwood Federal Camp on October 11, 1975, and admitted being apprehended two days later at his legal residence in New York City. The Respondent testified that he left Allenwood because of a well-founded fear of death or serious bodily harm. Specifically, Respondent testified that he had been gambling and became indebted to an inmate at Allenwood who began pressuring him for money. On October 11, 1977, this other inmate threatened the Respondent with a board which had a nail in the end of it. As a result of these threats and his belief that his life was in danger, Respondent fled the Allenwood Prison Camp that evening, October 11, 1977. See Transcript at p.p. 42-60. Apparently, this defense was the "complete fabrication without the slightest merit whatsoever," referred to by the Judge at sentencing.

On the issue of whether the Respondent could have taken steps other than leaving Allenwood to escape the alleged coercion and duress, he testified that he did not report the threats against him to the Allenwood authorities because there were no security facilities at Allenwood and because he was afraid that as an "informer" his safety would be even more injeopardy. See generally, Transcript at p.p. 76-77. Respondent further testified that

upon leaving Allenwood he went to New York rather than turning himself in at the Lewisburg Penitentiary because he knew that he would be apprehended at his residence in New York, and because he was afraid that he would be badly treated by the Lewisburg authorities because of his escapee status. See generally, Transcript at p. 85.

In his charge to the jury, the trial judge listed the four elements of the crime of escape under 18 U.S.C. Section 751(a), and stated to the jury:

> "There is no dispute in this case with respect to the first three elements. The Defendant admits that he was lawfully confined and that he left the Allenwood Prison Camp without permission. However the last element of the offense of escape with intent to avoid confinement is in dispute.
>
> In order to sustain its burden of proof in this case, the Government must prove beyond a reasonable doubt that the Defendant voluntarily departed from custody with an intent to avoid confinement.
>
> The Defendant has introduced evidence suggesting that any illegal acts which he may have committed were the result of coercion or compulsion or duress. Now compulsion or coercion or duress may provide a legal excuse for the crime charged in the indictment. In order, however, to provide a legal excuse for any criminal conduct, the compulsion must be present and immediate and of such a nature as to induce a well-founded fear of impending death or serious bodily injury. And there must be no reasonable opportunity to avoid compulsion without committing the crime.
>
> If the evidence in the case should leave you with a reasonable doubt whether at the time and place of the alleged offense the Defendant Grayson acted willfully and voluntarily--that is to say whether the accused was forced in effect to commit the crime charged in the indictment by coercion or compulsion as just explained--then you should acquit the accused.
>
> Whether the Defendant had a reasonable opportunity to avoid the coercion or compulsion or duress without leaving Allenwood

Prison Camp depends upon whether he acted as an ordinary man would have acted under all the same circumstances; that is whether an ordinary man would have felt it necessary to leave the Allenwood Prison Camp when faced with the same degree of compulsion, coercion or duress as the Defendant was faced with in this case.

If you find that the Defendant was compelled to leave the Allenwood Federal Prison Camp but that after he left, he voluntarily decided to remain at large, you may find the Defendant guilty of escape." (Emphasis added). Transcript at p.p. 223-225.

ARGUMENT

In urging the Court to grant the Petition, Petitioner relies on two separate considerations as set forth in Supreme Court Rules 19: (1) that the issue here presented is a very important question of federal law since sentencing judges must know whether they may take into account in imposing sentence a belief that the Defendant gave false testimony during the trial, and (2) that there is a conflict between the Circuit Courts of Appeals on this issue.

Petitioner argues that the Third Circuit's decision in the instant case is in accord only with Scott v. United States, 419 F. 2d 264, 268-269 (C. A. D.C.), and that the following eight decisions are to the contrary: United States v. Nunn, 525 F. 2d 958 (C.A. 5); United States v. Hendrix, 505 F. 2d 1233 (C.A. 2), certiorari denied, 423 U.S. 897; Hess v. United States, 496 F. 2d 936, 939 (C.A. 8); United States v. Moore, 484 F. 2d 1284, 1287 (C.A. 4); United States v. Cluchette, 465 F. 2d 749, 754-755 (C.A. 9); United States v. Wallace, 418 F. 2d 876, 878 (C.A. 6), certiorari

denied, 397 U.S. 955; United States v. Levine, 372 F. 2d 70, 74 (C.A. 7), certiorari denied, 388 U.S. 916; Humes v. United States, 186 F. 2d 875 (C.A. 10).

In several of these cases, e.g., Cluchette, Wallace, Levine, and Humes, supra, the issue of whether the sentencing judge can consider the Defendant's alleged perjury at trial was decided in passing and with very little discussion or reasoning. In two of the cases, Hess and Moore, supra, the courts' decision were somewhat equivocal. While these decisions held that in the particular cases before the courts the judge did not err in considering the Defendant's alleged perjury, the courts went on to state that in the usual case it is better for the trial judge who suspects perjury to request an investigation and that thereafter, if the facts warrant, the United States Attorney may initiate prosecution for the separate and distinct crime. See, e.g., United States v. Moore, supra, 484 F. 2d at 1288.

Although the decisions contrary to the Third Circuit's decision in the case at bar are not as overwhelming as a reading of the Petition would indicat Respondent admits that there is a conflict between the circuits on the question here presented. Furthermore, Respondent admits that the issue in this case is an important question of federal law. Nevertheless, Respondent urges the Court to deny the Petition for the reason that this important question of federal law is clouded by the particular facts in this case.

Most of the Circuit Court cases cited by the Petition as holding that a sentencing judge may consider the alleged perjury of the Defendant do not

discuss the alleged perjured testimony. However, those cases which do discuss the perjury would indicate that the Defendant's testimony was inconsistent with the jury's finding of guilt. Thus, in United States v. Hendrix, 505 F. 2d 1233, 1237 (2d Cir. 1974), it is pointed out:

> "This was a case where the jury could not have convicted without being persuaded beyond a reasonable doubt that the appellant had lied deliberately and willfully. The trial judge concurred in that unanimous persuasion."

See also, Hess v. United States, supra; United States v. Wallace, supra. In the case at bar, Judge Rosenn's dissenting opinion firmly relied upon such a requirement:

> "As an additional safeguard to the defendant, I would require that the falsity of the defendant's testimony be necessarily established by the finding of guilt. There must be no possibility that the substantive law applied was such that the factfinder could have believed the defendant's testimony at the same time as it found him guilty. If, for example, a person charged with burglary testified that he burglarized out of hunger, the substantive criminal law is such that the factfinder could find the defendant guilty even as it finds his testimony wholly truthful. On the other hand, when a defendant testifies to an alibi, a finding of guilt would necessarily rest on a finding that his testimony was false. This additional safeguard thus minimizes the possibility of abuse. A review of the record in this case reveals that Judge Muir applied both these safeguards."

See Petition at App. A, p. 31a.

Although Judge Rosenn apparently found that the Respondent's testimony was inconsistent with the jury's finding of guilt, it is respectfully submitted that a review of the facts in this case would indicate the contrary. As set forth at pages 2 and 3 of this Brief, supra, the Respondent's testimony went

to the element of intent and raised the defense of coercion and duress. By Judge Muir's charge to the jury, supra, at p.p. 3-4, the jury was instructed that "there must be no reasonable opportunity to avoid compulsion without committing the crime" and was further instructed to find the Respondent guilty if the jury concluded that "the Defendant was compelled to leave the Allenwood Federal Prison Camp but that after he left, he voluntarily decided to remain at large ...." Thus, it is entirely within the relm of possibility that the jury believed Respondent's testimony that he left Allenwood because of the threats against him, but nevertheless found him guilty because the jury felt he should have sought protection from the Allenwood authorities rather than leaving the camp. Alternatively, the jury could have felt that the Respondent's leaving the camp because of the threats was reasonable, but that he voluntarily decided to remain at large since he went to his apartment in New York City for two days rather than immediately turning himself in to the proper authorities.

It is quite clear, then, that the Respondent's testimony at trial was not necessarily inconsistent with the jury's finding of guilt. Unlike the other cases which have been decided by other courts, this case presents a very significant factual question as to whether the Respondent in fact committed perjury and the trial judges basis for believing that he did. It is submitted that this situation clouds the question which Petitioner requests this Court to resolve. The resolution of this important question of federal law should

await the time when it is posed more clearly and without the troublesome factual circumstances presented in the case at bar. This Court has denied or withdrawn certiorari where an important federal issue, upon which there was a conflict in the circuits, was not clearly presented in the case before it. See, The Monrosa v. Carbon Black, Inc., 359 U.S. 180 (1959). As indicated by the number of decisions in the Circuit Courts of Appeals which have considered the question of whether a sentencing judge may consider the alleged perjury of the Defendant, this issue is very likely to be presented again soon, and presented without the difficult factual circumstances present in the case at bar.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

John M. Humphrey, Esquire
Attorney for Respondent

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.
COPYRIGHT 1966 BY JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
80 EXCHANGE PL. AT BROADWAY, N.Y.C. 10004

Index No.

IN THE SUPREME COURT OF THE UNITED STATES

RUFUS WESLEY,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT OF SERVICE BY MAIL

RECEIVED

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 101 West 80th Street, New York, N.Y. 10024.

That on July 28, 19 77 deponent served the annexed Motion for Leave to Proceed in Forma Pauperis and Affidavit on the Solicitor General, Dept. of Justice attorney(s) for Respondent in this action at Dept. of Justice, Constitution Ave.& 10 St.N.W. Wash.D.C. 20530 the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me this 28th day of July, 1977.

August De Fonse
The name signed must be printed beneath

AUGUST DE FONSE

GEORGE COHEN
Notary Public, State of New York
No. 31-0682100
Qualified in New York County
Commission Expires March 30, 1979

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No.

RUFUS WESLEY,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ELEANOR JACKSON PIEL, being duly sworn, deposes and says:

1. I am the attorney for Rufus Wesley, the petitioner herein, and have served as his attorney pursuant to Court appointment under the Criminal Justice Act by reason of petitioner's indigency.

2. Petitioner is currently serving an eight year prison term in Atlanta, Georgia.

3. Because of poverty he is unable to pay the costs of this proceeding or to give security therefor.

4. Petitioner and his counsel believe that he is entitled to the redress he seeks.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No.

RUFUS WESLEY,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, Rufus Wesley, who is now held in a United States penitentiary at Atlanta, Georgia, asks leave to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit without prepayment of costs and to proceed in forma pauperis. The affidavit of Eleanor Jackson Piel, attorney for petitioner, in support of the petition, is attached hereto.

ELEANOR JACKSON PIEL
Attorney for Petitioner
36 West 44th Street
New York, New York 10036

United States Court for the Southern District of New York:

(1) He was denied the right to exercise a peremptory challenge to any alternate juror and two such alternates participated in the deliberations;

(2) He was arrested by federal authorities in another jurisdiction and was absent involuntarily for three days of trial;

(3) During the jury deliberations a juror communicated with the trial judge out of the presence of petitioner and his counsel and a discussion was had concerning that juror's withdrawal from the deliberation.

6. The foregoing three issues involve a violation of federal constitutional rights basic to due process of law.

ELEANOR JACKSON PIEL

Sworn to before me this
26th day of July, 1977.

GEORGE COHEN
Notary Public, State of New York
No. 31-0342100
Qualified in New York County
Commission Expires March 30, 1979

Supreme Court, U. S.
FILED
NOV 19 1977
MICHAEL RODAK, JR., CLERK

No. 76-1572

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

TED R. GRAYSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. McCREE, Jr.,
Solicitor General,
BENJAMIN R. CIVILETTI,
Assistant Attorney General,
KENNETH S. GELLER,
Assistant to the Solicitor General,
SIDNEY M. GLAZER,
PAUL J. BRYSH,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Summary of argument	7
Argument:	
A trial judge, in imposing sentence upon a convicted defendant, may take into account his belief that the defendant lied at trial	10
A. The district court has broad discretion to consider all reliable evidence relevant to the determination of a suitable sentence	11
B. The district court's belief that a defendant has intentionally given false testimony at trial is relevant to, and may properly be considered in, the sentencing determination	17
Conclusion	30

CITATIONS

Cases:	
Baker v. *United States*, 388 F. 2d 931	17
Bertrand v. *United States*, 467 F. 2d 901	22
Brown v. *United States*, 356 U.S. 148	26
Chaffin v. *Stynchcombe*, 412 U.S. 17	20, 24
Ferguson v. *Georgia*, 365 U.S. 570	20
Green v. *United States*, 365 U.S. 301	20
Gregg v. *Georgia*, 428 U.S. 153	13

Cases—Continued

	Page
Harris v. *New York*, 401 U.S. 222	23, 26
Haslam v. *United States*, 431 F. 2d 362, reaffirmed on rehearing, 437 F. 2d 955, certiorari denied, 402 U.S. 912	16
Hess v. *United States*, 496 F. 2d 936	19
Houle v. *United States*, 493 F. 2d 915	16
Humes v. *United States*, 186 F. 2d 875	19
McDonald v. *Massachusetts*, 180 U.S. 311	29
McGautha v. *California*, 402 U.S. 183	10, 27
McMann v. *Richardson*, 397 U.S. 759	10
Morrissey v. *Brewer*, 408 U.S. 471	13
North Carolina v. *Pearce*, 395 U.S. 711	13, 22
Oregon v. *Haas*, 420 U.S. 714	26
Pennsylvania ex rel. Sullivan v. *Ashe*, 302 U.S. 51	13, 18
Peterson v. *United States*, 246 Fed. 118, certiorari denied, 246 U.S. 661	18
Poteet v. *Fauver*, 517 F. 2d 393	4, 9, 21, 22
Rogers v. *United States*, 340 U.S. 367	23
Scott v. *United States*, 419 F. 2d 264	19, 22
Smith v. *United States*, 551 F. 2d 1193, certiorari denied, No. 76–1743, October 3, 1977	16
Spencer v. *Texas*, 385 U.S. 354	26, 29
Thomas v. *United States*, 368 F. 2d 941	22
Townsend v. *Burke*, 334 U.S. 736	15
United States v. *Atkins*, 480 F. 2d 1223	16
United States v. *Barker*, 514 F. 2d 208, certiorari denied, 421 U.S. 1013	17
United States v. *Bass*, 535 F. 2d 110	16
United States v. *Carden*, 428 F. 2d 1116	17
United States v. *Cardi*, 519 F. 2d 309	16
United States v. *Cluchette*, 465 F. 2d 749	19
United States v. *Crow Dog*, 537 F. 2d 308	17
United States v. *Crowe*, 516 F. 2d 824	16

Cases—continued

	Page
United States v. *Dent*, 477 F. 2d 447	17
United States v. *Doyle*, 348 F. 2d 715, certiorari denied, 382 U.S. 843	16
United States v. *Gamboa*, 543 F. 2d 545	19
United States v. *Ginzburg*, 398 F. 2d 52, certiorari denied, 403 U.S. 931	17
United States v. *Gonzalez*, 551 F. 2d 862, certiorari denied, No. 77–5101, October 31, 1977	26
United States v. *Haines*, 485 F. 2d 564, certiorari denied, 417 U.S. 977	26
United States v. *Haygood*, 502 F. 2d 166, certiorari denied, 419 U.S. 1114	16
United States v. *Hayward*, 471 F. 2d 388	23, 29
United States v. *Hendrix*, 505 F. 2d 1233, certiorari denied 423 U.S. 897	19, 25
United States v. *Johnson*, 507 F. 2d 826, certiorari denied, 421 U.S. 949	16
United States v. *Levine*, 372 F. 2d 70, certiorari denied, 388 U.S. 916	19
United States v. *Lustig*, 555 F. 2d 737, pending on petition for a writ of certiorari, No. 77–417	19
United States v. *Manfredonia*, 414 F. 2d 760	26
United States v. *Marcello*, 423 F. 2d 993, certiorari denied, 398 U.S. 959	17
United States v. *Marines*, 535 F. 2d 552	16
United States v. *Metz*, 470 F. 2d 1140, certiorari denied *sub nom. Davenport* v. *United States*, 411 U.S. 919	16
United States v. *Moore*, 484 F. 2d 1284	19, 25
United States v. *Nunn*, 525 F. 2d 958	19

Cases—continued

	Page
United States v. *Nunn*, 527 F. 2d 1390	22
United States v. *Strauss*, 443 F. 2d 986, certiorari denied, 404 U.S. 851	16
United States v. *Sweig*, 454 F. 2d 181	16, 22
United States v. *Tramunti*, 500 F. 2d 1334, certiorari denied, 419 U.S. 1079	26
United States v. *Tucker*, 404 U.S. 443	8, 15, 17
United States v. *Vermeulen*, 436 F. 2d 72, certiorari denied, 402 U.S. 911	23
United States v. *Wallace*, 418 F. 2d 876, certiorari denied, 397 U.S. 955	19
United States v. *Williams*, 341 U.S. 58	26
United States v. *Wong*, 431 U.S. 174	23
Welch v. *United States*, 371 F. 2d 287, certiorari denied, 385 U.S. 957	17
Williams v. *Illinois*, 399 U.S. 235	13
Williams v. *New York*, 337 U.S. 241	7, 12, 13, 15, 16, 17, 30
Williams v. *Oklahoma*, 358 U.S. 576	15, 17, 29

Statutes and regulations:

	Page
18 U.S.C. 751(a)	2
18 U.S.C. 3577	13
18 U.S.C. (1976 ed.) 4205(c)	14
18 U.S.C. (1976 ed.) 4205(d)	14
18 U.S.C. (1976 ed.) 4252	14
18 U.S.C. 5005 *et seq*	17
18 U.S.C. (1976 ed.) 5010(e)	14
18 U.S.C. (and supp. v) 5037	14
Federal Rules of Criminal Procedure:	
Rule 32(a)(1)	14
Rule 32(c)(2)	14
Federal Rules of Evidence:	
Rule 609	26

Miscellaneous:

	Page
American Bar Association, *Standards Relating to Pleas of Guilty* § 1.8(a)(v) (Approved Draft 1968)	22
American Bar Association, *Standards Relating to Sentencing Alternatives and Procedures* (1968):	
§ 2.2	15
§ 5.1(a)	20
Frankel, *Criminal Sentences; Law Without Order* (1972)	11, 12, 15
Glueck, *Probation and Criminal Justice* (1933)	15
Hoffman, *Purposes and Philosophy of Sentencing*, 75 F.R.D. 287	11
Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803 (1961)	12
Sobeloff, *Appellate Review of Sentences*, 32 F.R.D. 249	11
Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 Harv. L. Rev. 1281 (1952)	11
S. 1437, 95th Cong., 1st Sess., Part III (1977)	29

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1572

UNITED STATES OF AMERICA, PETITIONER

v.

TED R. GRAYSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The original judgment order of the court of appeals (Pet. App. D) is not reported. The opinion of the court on rehearing (Pet. App. A) is reported at 550 F. 2d 103.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on January 7, 1977, and a petition for rehearing was denied on March 17, 1977 (Pet. App. C). On April 7, 1977, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including May 16, 1977. The petition was filed on May 10, 1977, and was granted on October 3, 1977. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a trial judge, in determining an appropriate sentence for a convicted defendant, may take into account his belief that the defendant lied at trial.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Pennsylvania, respondent was convicted of prison escape, in violation of 18 U.S.C. 751(a). He was sentenced to two years' imprisonment, to be served consecutively to the three-year prison term he was already serving.

1. On October 11, 1975, respondent escaped from the Federal Prison Camp at Allenwood, Pennsylvania, where he had been confined since August 29, 1975, under a three-year sentence for distributing a controlled substance (App. 8). Two days later respondent was apprehended by agents of the Federal Bureau of Investigation at an apartment in New York City (App. 9, 18–19). At the time of his arrest, respondent denied that he was Ted Grayson (App. 11, 19).

At trial, respondent testified that he had left Allenwood under duress because he had been threatened by another inmate, Alex "Sarge" Barnes. According to respondent, he had owed Barnes 40 cartons of cigarettes for losses in a poker game, Barnes had threatened and assaulted him on a number of occasions when respondent had failed to meet demands to pay the debt in cash, and he had been confronted

by Barnes, wielding "a long board * * * with a nail protruding through it," on the evening of the escape (App. 23–29). Respondent also claimed that he had not reported these incidents to prison authorities because of his doubts that the guards could protect him, that he had escaped by climbing over the prison camp fence, that he had worn his prison trousers on the trip from Pennsylvania to New York, and that he had not attempted to avoid apprehension by law enforcement authorities following his unauthorized departure from Allenwood (App. 30, 45–49, 52).

Respondent's story was substantially discredited on rebuttal. Barnes testified that, although he had played cards with respondent in prison, they had never gambled for cigarettes, respondent had not owed him cigarettes or money as a result of a poker debt, and he had never argued with or threatened respondent (App. 65–67). In addition, correctional officials testified that, although respondent had repeatedly asked to be moved to the Metropolitan Correction Center in New York City to be closer to his girlfriend, he had never mentioned threats by other inmates as an additional reason requiring his transfer from Allenwood and that, shortly after the escape, a pair of prison trousers had been found next to respondent's shirt and jacket outside a hole in the prison fence (App. 72–77, 92–93).

In imposing sentence after the jury's verdict of guilty, the trial judge stated that he would "give [his] reasons for sentencing in this case with clarity, because one of the reasons may well be considered by

250-586—77——2

a Court of Appeals to be impermissible * * *" (App. 107). The judge then expressed his belief that respondent had perjured himself at trial (*ibid.*):[1]

> In my view a prison sentence is indicated, and the sentence that the Court is going to impose is to deter you, Mr. Grayson, and others who are similarly situated. Secondly, it is my view that your defense was a complete fabrication without the slightest merit whatsoever. I feel it is proper for me to consider that fact in the sentencing, and I will do so.

2. On appeal respondent contended, *inter alia*, that the district court had impermissibly relied in sentencing on its belief that respondent had lied at trial. The court of appeals initially affirmed without opinion (Pet. App. D). After respondent filed a petition for rehearing arguing that rejection of his contention was inconsistent with *Poteet* v. *Fauver*, 517 F. 2d 393 (C.A. 3),[2] however, the case was reheard and a divided panel of the court of appeals vacated respondent's

[1] In denying a motion for a new trial, the district court had earlier remarked that respondent's trial testimony "was a total fabrication and had no semblance of plausibility" (Pet. App. 4a, n. 2).

[2] *Poteet* involved a collateral attack on a bank robbery sentence imposed by a New Jersey court. At sentencing, the trial judge had attempted to extract confessions from Poteet and his co-defendant, Borowski. Borowski admitted his participation in the robbery and was sentenced to five years' imprisonment. Poteet refused to confess and was sentenced to a prison term of 14 to 16 years. The Third Circuit reversed the order of the district court denying relief and directed that Poteet be resentenced. See pp. 21–22, *infra*.

sentence and remanded for resentencing (Pet. App. A).[3]

In a separate opinion announcing the judgment of the court, Judge Garth stated his view that *Poteet* was controlling. While Judge Garth recognized that *Poteet* involved a significantly different factual setting,[4] he nonetheless concluded that the decision stood for the general principle, applicable here, that "'the sentencing judge may not add a penalty because he believes that the defendant lied'" (Pet. App. 8a). Judge Adams, concurring in the judgment, agreed that the "language and holding" of *Poteet* "inveigh against the practice of augmenting a sentence on account of a trial judge's belief that a defendant uttered false testimony" (Pet. App. 15a), but he added (*id.* at 15a–16a):

> Even if it were to be concluded that *Poteet* does not control the present case, I would have serious misgivings about the propriety of the sentencing procedure employed by the trial judge here. * * * If a trial judge increases a sentence because he is of the belief that a defendant's testimony is untruthful, such an action could be interpreted as penalizing the defendant for exercising his constitutional

[3] The government thereupon filed a petition for rehearing with a suggestion of rehearing *en banc*, which was denied, two judges dissenting (Pet. App. C).

[4] Judge Garth noted that in *Poteet* "the State trial judge was unsuccessful in his attempt to force Poteet to admit his guilt after the verdict and after a co-defendant had been forced to 'confess'" and "added ten years to Poteet's sentence because of his failure to 'confess'" (Pet. App. 7a).

> right to take the stand. In addition, this practice could have the impermissible effect of deterring future defendants from testifying in their own behalf. Also, the defendant is, in effect, being punished for perjury, a separate offense that can be the subject of a criminal prosecution.

Judge Rosenn, dissenting, distinguished *Poteet* from the present case on the ground that "[t]he sentencing judge emphasized that he was not concerned with Poteet's false testimony on the stand but with Poteet's refusal to confess *after* the jury had rendered its verdict against him" (Pet. App. 19a; emphasis in original). He also rejected the constitutional arguments that troubled Judge Adams, observing that the sentencing judge "was not imposing any sentence for any independent crime; he was merely considering the behavior and character of the defendant as he saw the defendant and heard the evidence during the trial in his imposition of sentence for the underlying crime" (*id.* at 22a; footnote omitted). Judge Rosenn therefore concluded (*id.* at 30a):

> The exclusion from the scope of the [sentencing] judge's inquiry of visible and clear conduct of the defendant in the presence of the judge during trial needlessly limits the judicial process in dispensing justice and adds little to the due process interests of the defendant.[*]

[*] Judge Rosenn did suggest two limitations on the sentencing judge's discretion to consider a defendant's false trial testimony: the judge should be "convinced beyond a reasonable doubt that the defendant intentionally lied on material issues of fact," and "the falsity of the defendant's testimony [should] be necessarily established by the finding of guilt" (Pet. App. 30a–31a).

SUMMARY OF ARGUMENT

A. Sentencing is perhaps the most difficult task of a federal district judge. Because the premise of the federal sentencing process is that "the punishment should fit the offender and not merely the crime" (*Williams* v. *New York*, 337 U.S. 241, 247) the district court in a relatively short time must learn as much as it can about the nature of the individual who has been convicted and must then use that knowledge to arrive at a sentence that is both wise and just.

Congress has recognized the difficulty of this task by providing trial judges with special tools to assist them in developing an adequate record upon which to fix a suitable sentence. Thus, Congress has authorized the district court to consider, not only the facts adduced during trial and at a sentencing hearing, but also presentence investigation reports prepared by the probation service and studies prepared by the Attorney General and the Bureau of Prisons, each of which includes details of the defendant's prior criminal record as well as substantial other information regarding his character and behavior. The appellate courts have consistently upheld the legality of sentences based upon the trial judge's assessment of this diverse information, the sole limitations being that the matters considered must be reliably established and reasonably related to a recognized purpose of sentencing. In short, as this Court has observed, given his responsibility the sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may

consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446.

B. The district court's belief that a defendant has committed perjury at trial is surely the kind of information that may legitimately be taken into account in this individualized approach to sentencing. A defendant's willingness to lie under oath in an effort to escape the consequences of his unlawful actions indicates his continued disrespect for the necessity to obey societal rules, whether or not they are beneficial to one's personal interests, and may therefore serve as an accurate barometer of the defendant's need for, and prospects of, rehabilitation and reformation. Eight courts of appeals have accordingly upheld the appropriateness of considering a defendant's false trial testimony in fixing a proper sentence.

Indeed, a trial judge's determination that a defendant has committed perjury on the witness stand is in many ways more probative, and more reliable, than many of the other sources and types of information that courts regularly take into account in imposing sentence. The determination is based upon the judge's personal observations, rather than the impressions of others; it is formed after hearing admissible evidence and sworn testimony, subject to cross-examination, rather than hearsay reports; and it is one of the most recent indicia of the nature of the defendant's character, generally occurring within days or weeks of sentencing.

None of the reasons offered by the court of appeals justifies a blanket prohibition against a sentencing judge's consideration of a defendant's perjury. Un-

like *Poteet* v. *Fauver*, 517 F. 2d 393 (C.A. 3), on which the court principally relied, consideration of the fact that the defendant intentionally lied at trial would not punish the assertion of a constitutional right, since there is no right to commit perjury. Nor are there any due process or double jeopardy objections to the sentencing proceedings in this case. Respondent was informed prior to the imposition of sentence that the trial judge intended to rely upon his trial testimony, which the judge termed "a complete fabrication without the slightest merit whatsoever" (App. 107), and he was afforded the opportunity to deny or explain it. Moreover, the trial judge's consideration of prior criminal activity in fixing sentence for a subsequent crime was not the equivalent of multiple punishment for the earlier offense, but rather was a permissible factor to be taken into account in determining the degree of punishment that should be imposed for the offense of which respondent had been convicted.

Finally, a rule permitting the trial judge to consider a defendant's perjury in sentencing would not impermissibly deter defendants from taking the stand in their own defense. The defendant's prime concern at trial is the avoidance of a conviction. It is exceedingly unlikely that a defendant would jeopardize his chance of an acquittal by foregoing the presentation of truthful, exculpatory testimony because of the remote possibility that he would be convicted and that the court would erroneously view his testimony as false and would enhance his sentence accordingly. More important, a defendant must consider a number

of possible adverse consequences when he decides whether to testify in his own behalf, including his exposure to cross-examination, to the introduction of damaging evidence about his character and credibility, and to the possibility of a subsequent perjury prosecution. The likely impact of his testimony on his eventual sentence is merely one more factor that a defendant must assess. The criminal process, like the rest of the legal system, "is replete with situations requiring 'the making of difficult judgments' as to which course to follow." *McGautha* v. *California*, 402 U.S. 183, 213, quoting from *McMann* v. *Richardson*, 397 U.S. 759, 769.

ARGUMENT

A TRIAL JUDGE, IN IMPOSING SENTENCE UPON A CONVICTED DEFENDANT, MAY TAKE INTO ACCOUNT HIS BELIEF THAT THE DEFENDANT LIED AT TRIAL

The court of appeals held that respondent must be resentenced by the district court without consideration of his false trial testimony. According to Judges Garth and Adams, the trial judge could not be allowed to weigh respondent's testimony in fixing a suitable sentence, even after finding it to be "a complete fabrication without the slightest merit whatsoever" (App. 107), because to do so would penalize respondent for exercising his rights, would violate due process by punishing him for perjury without notice of the charge or an opportunity to be heard, or would deter other criminal defendants from taking the witness stand by placing an unfair burden on their right to testify.

We submit that the court of appeals' decision manifests a fundamental misunderstanding of the role played by a defendant's false trial testimony in the sentencing determination and improperly restricts the district court's wide discretion, expressly and repeatedly approved by this Court and Congress, to consider all relevant and reliable evidence concerning a defendant's background and character in selecting an appropriate sanction for his criminal offense. Moreover, none of the rationales proferred by the panel majority in support of this restriction can withstand analysis.

A. THE DISTRICT COURT HAS BROAD DISCRETION TO CONSIDER ALL RELIABLE EVIDENCE RELEVANT TO THE DETERMINATION OF A SUITABLE SENTENCE

1. Sentencing is generally considered to be the most difficult, and most important, task of a federal trial judge.* In large part this difficulty is attributable to the nature of the federal sentencing process. As Judge Marvin Frankel, one of the more informed and thoughtful observers of this process, has written:

> [T]he prevalent thesis of the last hundred years or so has been that the treatment of criminals must be "individualized." The Mikado's boast, we have proudly thought, was silly; the punishment in a civilized society must fit the unique

* See, *e.g.*, Frankel, *Criminal Sentences; Law Without Order* 54 (1972); Hoffman, *Purposes and Philosophy of Sentencing*, 75 F.R.D. 287; Sobeloff, *Appellate Review of Sentences*, 32 F.R.D. 249, 261; Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 Harv. L. Rev. 1281, 1291 (1952).

> criminal, not the crime. The "crime," after all, may describe with a single, mechanical label kinds of misconduct and, more importantly, kinds of individual offenders displaying no similarities of any substantial sort. To assign rigidly a prescribed penalty for each crime (the so-called "tariff" system) is Procrustean. Sentiments like these carried the day long ago; it is scarcely imaginable that they could be questioned today.

Frankel, *Criminal Sentences; Law Without Order* 9-10 (1972).

In order to ensure that "the punishment should fit the offender and not merely the crime" (*Williams* v. *New York*, 337 U.S. 241, 247), Congress has provided a maximum and, on occasion, a minimum penalty for each criminal offense, often with a wide gulf in between, and has delegated to the district court the exclusive responsibility for choosing an appropriate term of imprisonment, period of probation, or fine from a broad and varied range of options. Unfortunately, however, the sentencing process is not simply a matter of ascertaining certain objectively demonstrable facts about a particular defendant and then translating those facts into months or years of confinement. Rather, sentences "turn on a discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done." Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803, 813 (1961). "For the determination of sentences," this Court has

observed time and again, "justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender. His past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him." *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U.S. 51, 55. See also *Gregg* v. *Georgia*, 428 U.S. 153, 189; *Williams* v. *Illinois*, 399 U.S. 235, 243; *North Carolina* v. *Pearce*, 395 U.S. 711, 723; *Williams* v. *New York*, *supra*, 337 U.S. at 248-249, n. 13.

Sentencing, then, is an exceedingly individualized, "predictive and discretionary" function. *Morrissey* v. *Brewer*, 408 U.S. 471, 480. For these reasons, a trial judge in the federal judicial system has always been accorded broad latitude regarding the sources and types of information about a defendant that he may utilize to asist him in determining the precise extent and type of sentence to be imposed within the limits fixed by law.

2. Congress, this Court, and the courts of appeals have recognized the wisdom of—indeed, the necessity for—permitting a trial judge to gather and assess a wide variety of information about a defendant prior to imposing sentence. 18 U.S.C. 3577 expressly provides:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense

which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

District courts also have been provided with expert tools to assist them in developing an adequate record upon which to fix a suitable sentence. The court may request a presentence investigation report from the probation service, containing "any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court" (Fed. R. Crim. P. 32(c)(2)); it must allow the defendant, his attorney, and government counsel to present matters in mitigation or enhancement of punishment prior to imposing sentence and may hold an evidentiary hearing to elicit additional information or resolve disputed issues of fact (Fed. R. Crim. P. 32(a)(1)); and, if the court still finds itself insufficiently familiar with the defendant's character or prospects for improvement, it may order a period of temporary incarceration to allow the Attorney General and the Bureau of Prisons to study the prisoner and develop a report that "may include but shall not be limited to data regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent." 18 U.S.C. (1976 ed.) 4205(d). See 18 U.S.C. (1976 ed.) 4205(c), 4252, 5010(e), 5037.

Furthermore, appellate courts have consistently upheld the legality of sentences based upon the trial judge's assessment of this diverse information, the sole limitations being that the matters considered must be reliably established and reasonably related to a recognized purpose of sentencing. See *United States* v. *Tucker*, 404 U.S. 443, 447; *Townsend* v. *Burke*, 334 U.S. 736, 741.[1] Hence, because of its obvious relevance to a number of legitimate sentencing considerations, a defendant's prior criminal conduct has always been viewed as one of the prime factors that a trial judge may take into account in imposing sentence. See, *e.g.*, *United States* v. *Tucker*, *supra*, 404 U.S. at 447; *Williams* v. *Oklahoma*, 358 U.S. 576, 584; *Williams* v. *New York*, *supra*, 337 U.S. at 244. A criminal record may show that prolonged incarceration of a defendant is required for the protection of society, as punishment, or to reform and rehabilitate the offender. Indeed, the probative value of this evidence is so substantial that a defendant's previous misconduct

---

[1] This Court has identified the main goals of criminal sentences as:

"1st. The protection of society against wrong-doers.

"2nd. The punishment—or much better—the discipline of the wrong-doer.

"3rd. The reformation and rehabilitation of the wrong-doer.

"4th. The deterrence of others from the commission of like offenses."

Williams v. *New York*, *supra*, 337 U.S. at 249, n. 13, quoting from Glueck, *Probation and Criminal Justice* 113 (1933). See also American Bar Association, *Standards Relating to Sentencing Alternatives and Procedures* § 2.2 (1968) ("The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant."); Frankel, *supra*, at 106.

may legitimately be considered even in the absence of a conviction. The sentencing judge may take note of uncharged criminal acts,[8] arrests,[9] pending indictments,[10] dismissed charges,[11] charges that have been reversed on appeal,[12] and even charges that have ended in an acquittal.[13]

Similarly, evidence of a defendant's status or behavior not amounting to a crime obviously plays an important role in the determination of a proper sentence. It is not only advisable but also essential that the court consider facts bearing on the defendant's

[8] See, *e.g.*, *United States* v. *Bass*, 535 F. 2d 110, 118–120 (C.A. D.C.) (defendant's involvement in large-scale drug dealing); *United States* v. *Crowe*, 516 F. 2d 824, 826 (C.A. 4) (defendant's offer not to testify against a co-defendant in return for cash); *United States* v. *Strauss*, 443 F. 2d 986, 990–991 (C.A. 1), certiorari denied, 404 U.S. 851 (defendant's membership in organized crime syndicate); *Haslam* v. *United States*, 431 F. 2d 362, 364 (C.A. 9), reaffirmed on rehearing, 437 F. 2d 955 (C.A. 9), certiorari denied, 402 U.S. 912 (defendant's failure to appear for sentencing).

[9] See, *e.g.*, *Williams* v. *New York*, *supra*, 337 U.S. at 244; *Smith* v. *United States*, 551 F. 2d 1193, 1195–1196 (C.A. 10), certiorari denied, No. 76-1743, October 3, 1977; *Houle* v. *United States*, 493 F. 2d 915 (C.A. 5).

[10] See, *e.g.*, *United States* v. *Johnson*, 507 F. 2d 826, 829–830 (C.A. 7), certiorari denied, 421 U.S. 949; *United States* v. *Haygood*, 502 F. 2. 166, 169–172 (C.A. 7), certiorari denied, 419 U.S. 1114; *United States* v. *Metz*, 470 F. 2d 1140, 1141–1142 (C.A. 3), certiorari denied *sub nom. Davenport* v. *United States*, 411 U.S. 919.

[11] See, *e.g.*, *United States* v. *Marines*, 535 F. 2d 552, 554–555 (C.A. 10); *United States* v. *Doyle*, 348 F. 2d 715, 721 (C.A. 2) (Friendly, J.), certiorari denied, 382 U.S. 843.

[12] See, *e.g.*, *United States* v. *Atkins*, 480 F. 2d 1223, 1224 (C.A. 9).

[13] See, *e.g.*, *United States* v. *Cardi*, 519 F. 2d 309, 314, n. 3 (C.A. 7); *United States* v. *Sweig*, 454 F. 2d 181, 184 (C.A. 2).

character,[14] age, health and family situation,[15] past life and habits,[16] and a host of other factors that would contribute to an informed exercise of the trial judge's broad discretion. Finally, the court may of course consider the circumstances, both aggravating and extenuating, surrounding a defendant's commission of the crime of which he was found guilty.[17] In sum, it is settled that a sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come" (*United States* v. *Tucker*, *supra*, 404 U.S. at 446) and may take into account any credible information shedding light upon the defendant's "life, health, habits, conduct, and mental and moral propensities" (*Williams* v. *New York*, *supra*, 337 U.S. at 245).

B. THE DISTRICT COURT'S BELIEF THAT A DEFENDANT HAS INTENTIONALLY GIVEN FALSE TESTIMONY AT TRIAL IS RELEVANT TO, AND MAY PROPERLY BE CONSIDERED IN, THE SENTENCING DETERMINATION

1. The discussion thus far has demonstrated that a trial judge in the federal system has virtually limit-

[14] See, *e.g.*, *United States* v. *Carden*, 428 F. 2d 1116, 1118 (C.A. 8); *United States* v. *Ginzburg*, 398 F. 2d 52, 55 (C.A. 3) (*en banc*), certiorari denied, 403 U.S. 931; *Baker* v. *United States*, 388 F. 2d 931, 934 (C.A. 4).

[15] See, *e.g.*, *United States* v. *Dent*, 477 F. 2d 447, 449, n. * (C.A. D.C.); *Welch* v. *United States*, 371 F. 2d 287, 294 (C.A. 10), certiorari denied, 385 U.S. 957. See also 18 U.S.C. 5005 *et seq.* (Federal Youth Corrections Act).

[16] See, *e.g.*, *United States* v. *Marcello*, 423 F. 2d 993, 1012 (C.A. 5), certiorari denied, 398 U.S. 959.

[17] See, *e.g.*, *Williams* v. *Oklahoma*, *supra*, 358 U.S. at 585; *United States* v. *Crow Dog*, 537 F. 2d 308, 310 (C.A. 8); *United States* v. *Barker*, 514 F. 2d 208, 227 (C.A. D.C.), certiorari denied, 421 U.S. 1013.

less discretion to consider reliable information bearing some relevance to the determination of an appropriate sentence. The sentencing judge's belief that the defendant has committed perjury at trial is surely among the types of information that may be taken into account.

A defendant's willingness to lie under oath in an effort to escape the consequences of his unlawful actions, like a defendant's decision to threaten a juror or witness in an effort to obstruct justice or to suborn perjury at his trial (see *Peterson* v. *United States*, 246 Fed. 118 (C.A. 4), certiorari denied, 246 U.S. 661), unquestionably is a telling commentary on his character, revealing the defendant's continued lack of respect for the necessity to abide by societal rules, even those not beneficial to one's personal interests. It may therefore serve as an accurate barometer of the defendant's prospects for rehabilitation and reformation.[18] In a passage worth quoting in full, the Second Circuit has observed:

> The effort to appraise "character" is, to be sure, a parlous one, and not necessarily an enterprise for which judges are notably equipped by prior training. Yet it is in our existing scheme of sentencing one clue to the rational exercise of discretion. If the notion of "repentance" is out of fashion today, the fact

[18] Cf. *Pennsylvania ex rel. Sullivan* v. *Ashe*, *supra*, 302 U.S. at 55 (convict's escape from prison is a relevant factor in sentencing because it "shows him still disposed to evil and determined to remain hostile to society").

> remains that a manipulative defiance of the law is not a cheerful datum for the prognosis a sentencing judge undertakes. * * * Impressions about the individual being sentenced—the likelihood that he will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, the degree to which he does or does not deem himself at war with his society—are, for better or worse, central factors to be appraised under our theory of "individualized" sentencing. The theory has its critics. While it lasts, however, a fact like the defendant's readiness to lie under oath before the judge who will sentence him would seem to be among the more precise and concrete of the available indicia.

United States v. *Hendrix*, 505 F. 2d 1233, 1236 (C.A. 2) (Frankel, J.), certiorari denied, 423 U.S. 897. It is for these reasons that eight courts of appeals have upheld the authority of district courts to consider a defendant's commission of perjury at trial in determining a proper sentence.[19]

[19] In addition to *Hendrix*, see *United States* v. *Lustig*, 555 F. 2d 737, 751 (C.A. 9), pending on petition for a writ of certiorari, No. 77-417; *United States* v. *Gamboa*, 543 F. 2d 545, 547 (C.A. 5); *United States* v. *Nunn*, 525 F. 2d 958 (C.A. 5); *Hess* v. *United States*, 496 F. 2d 936, 939 (C.A. 8); *United States* v. *Moore*, 484 F. 2d 1284, 1287 (C.A. 4); *United States* v. *Cluchette*, 465 F. 2d 749, 754–755 (C.A. 9); *United States* v. *Wallace*, 418 F. 2d 876, 878 (C.A. 6), certiorari denied, 397 U.S. 955; *United States* v. *Levine*, 372 F. 2d 70, 74 (C.A. 7), certiorari denied, 388 U.S. 916; *Humes* v. *United States*, 186 F. 2d 875 (C.A. 10). The District of Columbia Circuit alone is in accord with the decision of the court below. See *Scott* v. *United States*, 419 F. 2d 264, 268–269 (C.A. D.C.).

We submit that there is little basis for permitting a sentencing judge to consider material contained in a presentence report or other extrajudicial documents but prohibiting him from relying upon his first-hand observations during trial. A district court's personal familiarity with the evidence adduced at trial, together with its opportunity for prolonged scrutiny of the defendant's demeanor and behavior during trial (particularly if he chose to take the witness stand), always has been viewed as providing unique insights into an appropriate sentencing disposition. See American Bar Association, *Standards Relating to Sentencing Alternatives and Procedures* § 5.1(a), p. 232 (1968).[20] Moreover, because the judge's belief that a defendant has lied during trial is based upon an evaluation of admissible evidence and sworn testimony, subject to cross-examination, rather than hearsay reports or the conclusory assessments of other persons,

[20] Years before criminal defendants were allowed to testify, they were afforded the opportunity to make an unsworn statement at trial (*Ferguson* v. *Georgia*, 365 U.S. 570, 582–583) and to speak before sentence was imposed (*Green* v. *United States*, 365 U.S. 301, 304). These statements obviously were intended to be considered by the trial judge in imposing sentence. It would be incongruous to permit a defendant's remarks to be considered for sentencing purposes if the judge found them to be truthful but to require that they be ignored if the judge believed them to be false. Cf. *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 32 ("Jury sentencing, based on each jury's assessment of the evidence it hears and appraisal of the demeanor and character of the accused, is a legitimate practice.").

there is less cause for concern about the factual accuracy of this particular predicate for the imposition of sentence. Finally, the defendant's conduct at trial, and especially his decision to offer false material testimony, often will be most probative of his chances for reformation at the time of sentencing because it will have occurred only days or weeks earlier, unlike prior criminal activity or other historical evidence of a defendant's character that may have taken place years before.

In short, a trial judge's belief that the defendant committed perjury at trial may be expected to be reliable and is clearly relevant to legitimate sentencing goals.

2. Although the court of appeals acknowledged the considerable authority supporting use of a defendant's false trial testimony in sentencing (Pet. App. 11a–12a, 16a–17a), it nonetheless concluded that it was bound to reach a contrary result in light of *Poteet* v. *Fauver*, 517 F. 2d 393 (C.A. 3). *Poteet* involved an effort by a state trial judge to coerce a confession from a defendant under the threat of imposing a longer sentence. After a jury had found them guilty of armed robbery, Poteet and his codefendant Borowski appeared for sentencing. Under intense questioning by the trial judge, Borowski eventually admitted his complicity in the robbery and was sentenced to five years at a state reformatory. Poteet, on the other hand, refused to confess his guilt and was sentenced to 14 to 16 years' imprisonment. The court of appeals found a constitutional infirmity in this sentencing proceeding because the trial judge

had penalized Poteet for refusing to waive his privilege against self-incrimination. *Id.* at 397–398."

We agree with the dissenting opinion of Judge Rosenn that the principles announced in *Poteet* have little if any relevance to the issues in this case. See also *United States* v. *Nunn*, 527 F. 2d 1390 (C.A. 5) (Rives, J., concurring in the denial of rehearing). A defendant, even after being found guilty at trial, has a Fifth Amendment privilege not to incriminate himself at allocution, and a sentencing judge may not burden the exercise of that privilege by an express or implied threat to impose greater punishment upon a defendant who refuses to acknowledge his guilt." The district court's consideration of a defendant's false testimony at trial, however, poses no such problem, for there is no constitutional right to commit perjury. See *United States* v. *Wong*, 431 U.S. 174, 178–180; *Harris* v. *New York*, 401 U.S. 222, 225."

Nor is there substance to the fears articulated by Judge Adams, concurring below, that a rule permitting a trial judge to consider a defendant's perjury in sentencing "could have the impermissible effect of deterring future defendants from testifying in their own behalf" (Pet. App. 15a–16a). It is, of course, no criticism of the practice that it would inhibit the mendacious defendant. We therefore assume that Judge Adams' concern is that defendants will be discouraged from giving truthful testimony in their own defense.

Whatever the theoretical niceties of this argument, the belief that a defendant on trial for a criminal offense would be swayed in his determination to take the witness stand by the remote possibility of an adverse consequence at sentencing is quite unrealistic. A defendant's overriding consideration is the avoidance of a conviction; the decision whether his testimony would be helpful in achieving that result depends upon a delicate balancing of a number of variables, such as the credibility of his testimony, his

---

[21] The same conclusion was reached in *Scott* v. *United States*, *supra*, 419 F. 2d at 266–268, where the court of appeals held that the sentencing judge had unconstitutionally exacted a price for a defendant's exercise of his Fifth Amendment privilege as well as his Sixth Amendment right to stand trial. See also *Bertrand* v. *United States*, 467 F. 2d 901, 902 (C.A. 5); *Thomas* v. *United States*, 368 F. 2d 941, 945 (C.A. 5). Cf. *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 725.

[22] There is, of course, a significant distinction "between responding favorably to an individual's sincere expression of remorse, and reacting in a hostile way because of a personal belief in the guilt of one who maintains his innocence and seeks review of the judgment." *Scott* v. *United States*, *supra*, 419 F. 2d at 282 (Leventhal, J., concurring). A disparity between co-defendants' sentences that is attributable solely to one defendant's having received a sentence concession based upon his showing of remorse, therefore, would be permissible. Cf. American Bar Association, *Standards Relating to Pleas of Guilty* § 1.8(a)(v) (Approved Draft 1968); *United States* v. *Sweig*, *supra*, 454 F. 2d at 184. The record in *Poteet*, however, left no doubt that the trial judge had increased Poteet's sentence because of the defendant's refusal to acknowledge his guilt.

[23] A defendant, for example, has no constitutional right not to incriminate other persons. See *Rogers* v. *United States*, 340 U.S. 367, 371. Thus, while a district court may not place a "price tag" on a defendant's refusal to incriminate himself at sentencing, it may validly consider his refusal to cooperate in efforts by law enforcement officials to ascertain the criminal involvement of others. See *United States* v. *Vermeulen*, 436 F. 2d 72, 76–77 (C.A. 2), certiorari denied, 402 U.S. 911. Cf. *United States* v. *Hayward*, 471 F. 2d 388, 391 (C.A. 7).

prior criminal record and susceptibility to impeachment, the strength of the government's case, and the availability of other defense evidence. It would be the rare defendant who, having determined that an assessment of these factors dictates that he take the witness stand, would jeopardize his chance of acquittal by foregoing the presentation of truthful, exculpatory testimony because of the speculative concern that his story would appear patently false, the jury would find him guilty, and the trial judge would take his testimony into account for the purpose of enhancing the sentence."[24]

There is, moreover, an additional reason why the court of appeals' worries about an improper "chilling

[24] In *Chaffin* v. *Stynchcombe*, 412 U.S. 17, this Court rejected a similar argument that a defendant would be "chilled" in the exercise of his right to appeal by the possibility that a jury on retrial would impose an increased sentence (*id.* at 33–34; footnote omitted):

"[T]he likelihood of actually receiving a harsher sentence is quite remote at the time a convicted defendant begins to weigh the question whether he will appeal. Several contingencies must coalesce. First, his appeal must succeed. Second, it must result in an order remanding the case for retrial rather than dismissing outright. Third, the prosecutor must again make the decision to prosecute and the accused must again select trial by jury rather than securing a bench trial or negotiating a plea. Finally, the jury must again convict and then ultimately the jury or the judge must arrive at a harsher sentence in circumstances devoid of a genuine likelihood of vindictiveness. While it may not be wholly unrealistic for a convicted defendant to anticipate the occurrence of each of these events, especially in the infrequent case in which his claim for reversal is strong and his first sentence was unusually low, we cannot agree with petitioner that such speculative prospects interfere with the right to make a free choice whether to appeal."

effect" are unpersuasive. The court assumes that every defendant who elects to testify at trial runs the risk that, if convicted, he will be viewed by the sentencing judge as a perjuror. But common sense suggests that "trial judges generally are (or become) sophisticated and experienced enough to know" that this assumption is untrue. *United States* v. *Hendrix, supra*, 505 F. 2d at 1236. Judges are aware that some defendants may have a faulty memory rather than an intent to deceive, that others may protest their innocence in good faith because of their subjective opinion (not shared by the jury) that some essential element of criminal conduct, such as knowledge, intent, malice, or premeditation, has not been proven, and that still others may in fact be innocent despite having been found guilty beyond a reasonable doubt. There is therefore no reason to believe that a district court would routinely augment a sentence merely because the jury chose not to believe the defendant's version of events or that defendants who intend to testify truthfully would be discouraged from taking the stand because of the fear of a stiffer sentence."[25]

[25] Several courts of appeals, in the exercise of their supervisory powers, have cautioned the district court not to treat a defendant's perjury as an adverse sentencing factor unless they are persuaded beyond a reasonable doubt that the defendant committed it. See Pet. App. 31a (Rosenn, J., dissenting); *United States* v. *Hendrix*, *supra*, 505 F. 2d at 1236–1237; *United States* v. *Moore*, 484 F. 2d 1284, 1288 (C.A. 4). Although we doubt that such a rule is necessary or even consistent with the standards applied in connection with other factors considered in sentencing (*e.g.*, the relative culpability of co-defendants), it is in any event clear that these limita-

Even if the court of appeals' concern about a "chilling effect" were less fanciful, however, it would still not be impermissible to allow sentencing judges to consider a defendant's false testimony in assessing his character. A number of factors legitimately may dissuade a defendant from testifying at trial. For example, a defendant may be convinced not to take the stand because of the fear that he might be subjected to a perjury prosecution (*United States* v. *Williams*, 341 U.S. 58) [26] or searching cross-examination (*Brown* v. *United States*, 356 U.S. 148, 154–156) [27] or that the jury would be informed of his prior convictions for purposes of impeachment (see *Spencer* v. *Texas*, 385 U.S. 354; Fed. R. Evid. 609), yet it has never seriously been suggested that the existence of these consequences improperly burdens a defendant's right to

---

tions were satisfied by the district court in this case. Respondent's testimony was directly contradicted by substantial other evidence at trial and was termed "a complete fabrication without the slightest merit whatsoever" (App. 107) by the sentencing judge. Moreover, in view of respondent's elaborate explanation for his escape from Allenwood, it is exceedingly unlikely that the jury would have believed his testimony and returned a guilty verdict.

[26] Such prosecutions have been instituted on occasion, suggesting that the fear is not an idle one. See, *e.g.*, *United States* v. *Gonsales*, 551 F. 2d 862 (table) (C.A. 5), certiorari denied, No. 77–5101, October 31, 1977; *United States* v. *Tramunti*, 500 F. 2d 1334 (C.A. 2), certiorari denied, 419 U.S. 1079; *United States* v. *Haines*, 485 F. 2d 564 (C.A. 7), certiorari denied, 417 U.S. 977; *United States* v. *Manfredonia*, 414 F. 2d 760 (C.A. 2).

[27] The cross-examination may even extend to matters that would not otherwise be admissible. *Oregon* v. *Haas*, 420 U.S. 714, 722; *Harris* v. *New York*, *supra*, 401 U.S. at 225–226.

testify in his own defense. Perhaps of more importance, a defendant may decide not to testify for fear that the jury might disbelieve his story and be more disposed to return a guilty verdict, yet no one has ever urged that jurors must be instructed not to do so lest the defendant be deterred from giving evidence.

Indeed, the Court has rejected a quite similar argument of impermissible "chilling effect" in *Crampton* v. *Ohio*, a companion case to *McGautha* v. *California*, 402 U.S. 183. *Crampton* involved a state procedure by which guilt and punishment were determined by the jury at a single trial. Under the Ohio unitary-trial rule, the defendant could remain silent on the issue of guilt only by surrendering his chance to be heard by the jury on the issue of punishment and could testify on the issue of punishment only by waiving his privilege against self-incrimination on the question of guilt, an election (defendant argued) that "create[d] an intolerable tension between constitutional rights." *Id.* at 211. This Court disagreed, observing that "[t]he criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. *McMann* v. *Richardson*, 397 U.S. [759,] 769," and that the situation faced by defendants in unitary trials was no different from a host of other "choices with which criminal defendants and their attorneys are quite routinely faced." *Id.* at 213, 215. It is, said the Court, "not thought inconsistent with the enlightened administration of criminal justice to require the defendant

to weigh such pros and cons in deciding whether to testify." *Id.* at 215. These principles, expressed in response to the contention that a defendant has a right to speak to his sentencer free from any adverse consequences on the issue of guilt, are equally applicable to respondent's analogous claim that a defendant must be allowed to testify at trial without apprehension that his testimony will be considered at sentencing.

Finally, Judge Adams suggested (Pet. App. 16a) that it is improper to take a defendant's false statements into account at sentencing because "the defendant is, in effect, being punished for perjury, a separate offense that can be the subject of a criminal prosecution." To the extent that this objection rests on due process or double jeopardy grounds, it is unpersuasive. Respondent was informed prior to the imposition of sentence that the trial judge believed his testimony to be false and intended to consider it. He could have argued to the court that his testimony was truthful (explaining, for example, why other, contradictory evidence at trial was untrustworthy or why the jury might have believed him but still convicted) or he could have offered mitigating circumstances for his behavior.

Nor was the Double Jeopardy Clause violated.[28] Consideration of prior criminal activity in fixing sentence for a subsequent crime "is not the equivalent of multiple punishment for the earlier offense, but

[28] Even if correct, the claim would presumably be available only in a subsequent perjury prosecution.

rather is a permissible method of determining the degree of punishment that should be imposed for the later offense." *United States* v. *Haygood, supra,* 502 F. 2d at 169. See *Williams* v. *Oklahoma, supra,* 358 U.S. at 584–586.[29] As Judge Rosenn correctly noted in dissent (Pet. App. 22a; footnote omitted):

> [The trial judge] was not imposing any sentence for any independent crime; he was merely considering the behavior and character of the defendant as he saw the defendant and heard the evidence during the trial in his imposition of sentence for the underlying crime.
>
> • • • • •

In sum, we do not contend that it would be impossible to devise a rational system under which a trial judge's discretion to consider and evaluate reliable evidence relevant to sentencing would be strictly circumscribed. Congress is in fact now considering legislation that would restructure the federal sentencing process by limiting the range of permissible sentences for each category of offense and by identifying with more precision the factors that must be weighed by the district court in selecting a sentence within that range.[30]

[29] Habitual offender statutes have consistently been sustained against double jeopardy challenges on the same basis. See, *e.g.*, *Spencer* v. *Texas*, *supra*, 385 U.S. at 559–560; *McDonald* v. *Massachusetts*, 180 U.S. 311, 312.

[30] See Part III of S. 1437, 95th Cong., 1st Sess. (1977), the sentencing provisions of the proposed revision of Title 18 of the United States Code, which was favorably reported out of the Senate Judiciary Committee on November 2, 1977.

Our present sentencing system, however, is otherwise. The currently prevailing view is that the trial judge's consideration of "the fullest information possible concerning the defendant's life and characteristics" (*Williams* v. *New York, supra,* 337 U.S. at 247) is an indispensable prerequisite to a reasoned sentencing determination. That being so, it makes bad law and little sense to carve out an exception for the highly probative and reliable evidence considered by the district court in this case. Respondent's willingness to lie under oath was of substantial relevance to his need for, and prospects of, rehabilitation, and the court of appeals erred in ruling that the district court could not legitimately take that into account at sentencing.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it vacated respondent's sentence and remanded the case to the district court for resentencing.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
BENJAMIN R. CIVILETTI,
Assistant Attorney General.
KENNETH S. GELLER,
Assistant to the Solicitor General.
SIDNEY M. GLAZER,
PAUL J. BRYSH,
Attorneys.

NOVEMBER 1977.

U.S. GOVERNMENT PRINTING OFFICE: 1977

Supreme Court, U. S.
FILED
DEC 21 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1572

UNITED STATES OF AMERICA,

Petitioner,

vs.

TED R. GRAYSON,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT TED R. GRAYSON

JOHN M. HUMPHREY, Esquire
23 West Third Street
Williamsport, PA 17701

Attorney for Respondent

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 1

STATEMENT 1

SUMMARY OF ARGUMENT 7

ARGUMENT:

A trial judge, in imposing sentence upon a convicted defendant, may not take into account his belief that the defendant lied at trial 10

A. The commission of perjury by a defendant during his trial has no legitimate relationship to the recognized purposes of sentencing 16

B. Alleged perjury by a defendant and the determination of its existence, is inherently different from other sentencing considerations 22

C. The threat of an increased sentence based upon the trial judge's belief that the defendant committed perjury during his trial, unconstitutionally "chills" the exercise of the defendant's right to testify in his own behalf 28

CONCLUSION 36

TABLE OF AUTHORITIES

Cases: *Page*

Baker v. United States, 412 F.2d 1069 (5th Cir. 1969) 13

Brooks v. Tennessee, 406 U.S. 605, 612 (1972) 28,32,33

Chaffin v. Stynchcombe, 412 U.S. 17, 32 (1973) 29

Communist Party v. Subversive Activities Control Board, 351 U.S. 115 (1956) 34

Crampton v. Ohio, 402 U.S. 183, 217 (1971) . 29,31,33

Gagnon v. Scarpelli, 411 U.S. 778 (1973) 11

Gore v. United States, 357 U.S. 386, 393 (1958) 11

Grunewald v. United States, 353 U.S. 391 (1957) 34

Hess v. United States, 496 F.2d 936 (8th Cir. 1974) 13,14

Humes v. United States, 186 F.2d 875 (C.A. 10) 14

Jencks v. United States, 353 U.S. 657 (1957) 34

Leblanc v. United States, 391 F.2d 916 (1st Cir. 19) 13

Marshall v. United States, 360 U.S. 310 (1959) 34

McGee v. United States, 462 F.2d 243 (2d Cir. 1972) 12

McNabb v. United States, 318 U.S. 332 (1943) 34

Mempa v. Rhay, 389 U.S. 128 (1967) 11

Morrissey v. Brewer, 408 U.S. 471 (1972) 11

Page

Parker v. North Carolina, 397 U.S. 700 (1970) 29

Peterson v. United States, 246 F.118 (4th Cir. 1917) cert. denied, 246 U.S. 661 (1918) 13

Poteet v. Fauver, 517 F.2d 396 (3d Cir. (1975) 13,15

Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969) 13,15,17,20,28

Specht v. Patterson, 386 U.S. 605 (1967) 25

Thomas v. United States, 368 F.2d 941 (5th Cir. 1966) 13

Townsen v. Burke, 334 U.S. 736 (1948) 27

United States v. Cavazos, 530 F.2d 4 (5th Cir. 1976) 12

United States v. Chuchette, 465 F.2d 749, 754-755 (C.A. 9) 14

United States v. Derrick, 519 F.2d 1 (6th Cir. 1975) 13

United States v. Dinapoli, 519 F.2d 104 (6th Cir. 1975) 12

United States v. Edwards, 443 F.2d 1286 (8th Cir. 1971) 18

United States v. Gamboa, 543 F.2d 545, 547 (C.A. 5) 14

United States v. Hendrix, 505 F.2d 1233, 1235-1237 (2d Cir. 1974) 14,19.20,35

United States v. Jackson, 390 U.S. 570 (1968) 29

United States v. Levine, 372 F.2d 70, 74 (C.A. 7), cert. denied, 388 U.S. 916 14,19

Page

United States v. Marzett, 485 F.2d 207 (8th Cir. 1973), cert. denied 415 U.S. 980 13

United States v. Moore, 484 F.2d 1284, 1287 (C.A. 4) 14,15,25,28,35

United States v. Nunn, 525 F.2d 958 (C.A. 5) 14,19

United States v. Stockwell, 472 F.2d 1186 (9th Cir. 1973) 13

United States v. Tucker, 404 U.S. 443 (1972) 12,27

United States v. Wallace, 418 F.2d 876, 878 (C.A. 6), cert. denied, 397 U.S. 955 14

United States v. Weiner, 479 F.2d 923 (2d Cir. 1973) 18

United States v. Weston, 448 F.2d 626 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972) 12,27

United States ex rel. Wilcox v. Johnson, 555 F.2d 115, (3d Cir. 1977) 28

United States v. Wiley, 278 F.2d 500 (7th Cir. 1960) 13

United States v. Williams, 341 U.S. 58 (1951) 18

Verduzo v. United States, 402 F.2d 599 (9th Cir. 1968), cert. denied, 411 U.S. 984 (1973) 12

Weiler v. United States, 323 U.S. 606 (1945) 18,26

Williams v. New York, 337 U.S. 241, 249 (1949) 11,17,22,25

Woolsey v. United States, 478 F.2d 139 (8th Cir. 1973) 12

Page

Statutes and Regulations:

323 U.S. 606 (1955) 18

341 U.S. 58 (1951) 18

18 U.S.C. Section 751(a) 5

18 U.S.C. Section 1621 18

18 U.S.C. Section 3481 28

Federal Rules of Criminal Procedure Rule 32(c)(2) 24

Miscellaneous:

Discretionary Penalty Increases On the Basis of Suspected Perjury, 1975 U. ILL. L.F. 677 (1975) 15

Falsification as Contempt, 7 VAND. L. REV. 272 (1954) 26

The Influence of the Defendant's Plea on Judicial Determination of Sentence, 66 YALE, L.J. 204, 211-217 (1956) .. 15,17,21,27,30,31

Plea Bargaining and the Transformation of the Criminal Process, 90 HARV. L. REV. 564 (1977) 21

Standards Relating to Pleas of Guilty, Section 1.8(a)(ii) (Approved Draft. 1968) 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1572

UNITED STATES OF AMERICA,

Petitioner,

vs.

TED R. GRAYSON,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

QUESTION PRESENTED

Whether a trial judge, in determining an appropriate sentence for a convicted defendant, may take into account his belief that the defendant lied at trial.

STATEMENT

For the most part, Respondent is satisfied with the factual background as set forth in Petitioner's Statement.

However, since the issue in this case centers around alleged perjury by Respondent during his trial, a more detailed rendition of the trial testimony is deemed necessary.

The parties stipulated that Respondent had been lawfully committed to the Allenwood Prison Camp on August 29, 1975 pursuant to a three-year sentence imposed by the United States District Court for the Eastern District of New York, and that on October 11, 1975, he left the Allenwood Prison Camp without permission (App. 8). Respondent left the Allenwood Prison Camp at approximately 9:30 P.M. on that date (App. 22). On October 13, 1975, at approximately 10:15 A.M., two agents of the Federal Bureau of Investigation took Respondent into custody at an apartment at 4 Park Avenue, New York City (App. 9, 10, 18), this being the same address which he had given as his home address upon commitment to Allenwood. (App. 22-23, 52). The FBI agents testified that upon taking him into custody, Respondent denied that he was Ted Grayson (App. 11, 19). Respondent testified that he did not deny his identity to the FBI agents, but he did refuse to tell them whether or not he was Ted Grayson (App. 31).[1]

At the conclusion of the Government's case in chief, Respondent took the stand and by his testimony raised the defense of duress. He testified that as a result of

[1] The recollection of the FBI agents concerning the facts surrounding Respondent's arrest was not particularly good. For example, Agent Petersen testified that Respondent was not handcuffed, and that Agent Bullard probably drove the car which took Respondent to headquarters (App. 17). Agent Bullard testified that he thought Agent Petersen drove the car and that Respondent was handcuffed (App. 21).

losses sustained in a poker game, he owed another inmate, Alex "Sarge" Barnes, 40 cartons of cigarettes. He began paying Barnes 3½ cartons of cigarettes per week since an inmate is permitted to purchase only 4 cartons of cigarettes per week from the camp commissary.[2] However, Barnes began to pressure Respondent for payment in cash, a valuable type of contraband at the prison camp. Barnes began applying the pressure on October 9, 1975 (App. 27, 35), and on October 11, 1975, at approximately 3:30 P.M., Barnes and several of his friends pushed Respondent against the wall and threw some punches at him (App. 27-28). Later in the evening on October 11, 1975, just prior to Respondent's leaving the prison camp, Barnes came into Respondent's dormitory carrying a board with a nail protruding through it and further threatened Respondent (App. 28-29).

Barnes, like Respondent a convicted felon, was called by the Government as a witness on rebuttal. He admitted his participation in card games with the Respondent, but claimed that the loser would pay by doing 25 pushups (App. 66) or perhaps a pack of cigarettes (App. 70). He denied that Respondent owed him anything as a result of the card games and denied ever confronting or

[2] Respondent testified that he incurred the debt to Barnes approximately three weeks (App. 35) before the October 11, 1975 escape, and that he thereafter made two payments to Barnes, the second of which depleted the balance in his commissary account (App. 25). Respondent's commissary account, Ex. D-1, indicated that he purchased from the commissary goods in the amount of $31.80 on September 30, 1975, and that he purchased goods in the amount of $8.39 on October 9, 1975. After this last purchase, the balance in his account was $.06 (App. 54-55).

threatening Respondent (App. 68-70). However, Respondent's version of the events was corroborated to some extent by another inmate who testified that on October 11, 1975, at approximately 3:00 P.M., he witnessed a portion of the confrontation between Respondent and Barnes. Although he saw no physical violence, he did hear Barnes or one of his several friends talking in a loud voice to Respondent (App. 61-64).

Shortly after being threatened by Barnes on the evening of October 11, 1975, Respondent left the Allenwood Prison Camp and hitchhiked to his residence in New York City. In order to avoid looking conspicuous, Respondent removed his jacket and shirt and left them outside of the fence surrounding the camp, but denied removing his prison issued trousers (App. 52). On rebuttal, the Government called a prison guard who testified that on the day following Respondent's escape, he searched the area outside of the fence and found "scattered" in the bushes various articles of clothing including Respondent's shirt, a prison issued jacket, and a pair of khaki work trousers which could not be identified as belonging to Respondent (App. 72-74). These items of clothing were found on Penny Hill (App. 75), an area well known as a drop-off point for contraband coming in and out of the Allenwood Prison Camp (App. 89). The khaki work pants which were found in this area were of the type worn by inmates on most of the work details at the prison camp. However, inmates working in the kitchen and hospital wore white work pants (App. 80-81). Respondent was assigned to the kitchen detail while at Allenwood (App. 89).

Respondent testified that although he had spoken with prison authorities about various problems, he never

told any officials about the pressure applied by Barnes because he was frightened, not thinking straight, and because he doubted the ability of the Allenwood officials to properly protect him (App. 30, 43). Respondent's caseworker admitted that an inmate complaining about being threatened is not transferred from Allenwood immediately, but rather, an investigation is undertaken (App. 95). Although Respondent testified that he began hitchhiking upon leaving the prison camp and was not attempting to avoid the state police (App. 50), he also testified that he removed his inmate clothing so that he would not be detected as an inmate, since his primary purpose was to get away from Allenwood (App. 51).

At the close of the evidence, the judge charged the jury. By the terms of the charge, the jury could have found the Respondent guilty despite believing all of his testimony. In charging the jury, the trial judge listed the four elements of the crime of escape under 18 U.S.C. Section 751(a), and then stated:

> "There is no dispute in this case with respect to the first three elements. The Defendant admits that he was lawfully confined and that he left the Allenwood Prison Camp without permission. However the last element of the offense of escape with intent to avoid confinement is in dispute.
>
> In order to sustain its burden of proof in this case, the Government must prove beyond a reasonable doubt that the Defendant voluntarily departed from custody with an intent to avoid confinement.
>
> The Defendant has introduced evidence suggesting that any illegal acts which he may have committed were the result of coercion or compulsion or duress. Now compulsion or coercion or duress may provide a legal excuse for the crime charged in

the indictment. In order, however, to provide a legal excuse for any criminal conduct, the compulsion must be present and immediate and of such a nature as to induce a well-founded fear of impending death or serious bodily injury. *And there must be no reasonable opportunity to avoid compulsion without committing the crime.*

If the evidence in the case should leave you with a reasonable doubt whether at the time and place of the alleged offense the Defendant Grayson acted willfully and voluntarily—that is to say whether the accused was forced in effect to commit the crime charged in the indictment by coercion or compulsion as just explained—then you should acquit the accused.

Whether the Defendant had a reasonable opportunity to avoid the coercion or compulsion or duress without leaving Allenwood Prison Camp depends upon whether he acted as an ordinary man would have acted under all the same circumstances; that is whether an ordinary man would have felt it necessary to leave the Allenwood Prison Camp when faced with the same degree of compulsion, coercion or duress as the Defendant was faced with in this case.

If you find that the Defendant was compelled to leave the Allenwood Federal Prison Camp but that after he left, he voluntarily decided to remain at large, you may find the Defendant guilty of escape." (Emphasis added).

Transcript at pp. 223–225. The jury found Respondent guilty as charged.

SUMMARY OF ARGUMENT

Historically, a sentencing judge has had wide discretion in sentencing a convicted defendant, both as to the length of the sentence and as to the sources and types of evidence used in determining the appropriate sentence. Recently, however, appellate courts have been less reluctant to review and set aside sentences where abuses of discretion are evident. A trial judge's consideration of a defendant's alleged perjury at trial is materially different from other legitimate sentencing considerations. Because of the actual and potential abuses caused by this practice, the Court should disapprove the consideration of alleged perjury by sentencing judges, either as a matter of constitutional law or in the exercise of the Court's supervisory power over the federal courts.

A. The commission of perjury by a defendant during his trial has no legitimate relationship to the recognized purposes of sentencing. The generally recognized purposes of sentencing include protection of society, punishment, deterrence, and rehabilitation.

If punishment, protection of society, or deterrence is the basis upon which a defendant's alleged perjury is considered in determining an appropriate sentence, then the defendant is in fact being sentenced for the crime of perjury. Because perjury is a substantive crime an individual charged with perjury is accorded the full constitutional guarantees accorded all other criminal defendants. Where a court makes a summary determination that a defendant committed perjury, and increases the sentence as punishment for the purpose of deterring other defendants from committing perjury, the defendant is denied due process of law. Recognizing this problem, courts

usually rationalize the consideration of perjury as a sentencing factor on the ground that perjury is a reflection of the character of the defendant and his prospects for rehabilitation, and therefore a legitimate consideration by the sentencing judge. However, this distinction is, at best, an obscure one.

Furthermore, it is doubtful that perjury by a defendant at his trial is in fact reflective of the defendant's need for rehabilitation. Because of the pressures which a criminal trial places upon a defendant, and because it is a natural inclination to attempt to avoid incarceration, a defendant is likely to testify falsely even though he is sincerely repentant and is otherwise a good candidate for rehabilitation. With the ascendance of the plea bargaining system, a defendant is more likely to admit his guilt for reasons of expediency and a desire to obtain sentencing concessions, rather than because of his principles against committing perjury. When a defendant avoids perjury out of expediency rather than principle, it is doubtful whether he is a better prospect for rehabilitation than the defendant who perjures himself in an unsuccessful effort to obtain acquittal.

B. Even assuming that perjury is relevant to a defendant's need for and prospects for rehabilitation, perjury as a sentencing factor is materially different from other factors relevant to the rehabilitation question. Unlike other legitimate sentencing factors such as prior criminal activity and general character traits, perjury is punishable in a separate criminal proceeding. Any additional incarceration which may be deemed necessary as a result of a defendant committing perjury should be given in the separate proceedings which provide the accused normal constitutional safeguards. Furthermore, perjury

is the only sentencing factor the existence of which the trial judge is called upon to determine. It has long been recognized that perjury is inherently difficult to establish and therefore, additional proof requirements such as the "two witness rule" has been made a part of perjury prosecutions. A summary determination of perjury by a trial judge ignores these recognized proof problems, and therefore, it is quite likely to be incorrect since it may be based upon the judge's impressions or suppositions gained in the emotional context of the criminal trial. Federal courts have always been concerned with the veracity of facts considered by a judge in sentencing.

C. The threat of an increased sentence based upon the trial judge's belief that the defendant committed perjury during his trial, unconstitutionally "chills" the exercise of the defendant's right to testify in his own behalf. In determining whether a particular practice "chills" constitutional or statutory rights, the legitimacy of and policy behind the particular practice must be weighed against the extent to which it actually impedes the exercise of the particular right involved. As previously pointed out, it is doubtful whether perjury has any relevance to legitimate sentencing considerations. Consideration of perjury as a sentencing factor is further rendered doubtful because of the alternative remedy available in cases of alleged perjury, and because it is often so difficult for the trial judge to make this determination. Because of the doubtful validity of the practice in the first place, it is not necessary to show a substantial "chilling" effect. Nevertheless, it is clear that sentence enhancement for alleged perjury is a common practice. Realizing that his sentence may be increased because of the judge's belief that he committed perjury,

an innocent defendant may very likely avoid this risk and negotiate a plea in order to receive a less severe sentence.

D. Whether or not the Court agrees with Respondent's contention that the practice here in issue is unconstitutional, it cannot be doubted that there are substantial problems in permitting a sentencing judge to consider his belief that the defendant gave false testimony. Therefore, if the Court is unwilling to brand this practice unconstitutional, it should at least exercise its supervisory powers over federal courts by prohibiting the practice in federal criminal trials or by imposing severe restrictions. At a minimum, a trial judge should not be permitted to consider alleged perjury as a sentencing factor unless the falsity of the defendant's testimony is necessarily established by the finding of guilt.

ARGUMENT

A TRIAL JUDGE, IN IMPOSING SENTENCE UPON A CONVICTED DEFENDANT, MAY NOT TAKE INTO ACCOUNT HIS BELIEF THAT THE DEFENDANT LIED AT TRIAL.

The issue presented in this case was brought sharply into focus when the trial judge, following his customary and commendable practice of listing reasons for sentences imposed upon convicted defendants, clearly stated that one of the two factors which he considered in determining an appropriate sentence for the Respondent was his belief that Respondent's defense "was a complete fabrication without the slightest merit whatsoever" (App.

107). It is Respondent's contention that the trial judge's belief was erroneous and unsupported, but even if supported, it was improper for the judge to consider this factor when sentencing Respondent on the escape conviction.

If there had been any doubt before, the case of *Williams v. New York*, 337 U.S. 241 (1949), established that this country's concept of individualized punishment allowed a sentencing judge "wide discretion in the sources and types of evidence used by him in determining the kind and extent of punishment to be imposed . . ." *Id.* at 247. Thus, without affording due process safeguards to the defendant, the sentencing judge can take into account information concerning the defendant's life, health, habits, conduct, and mental and moral propensities, including hearsay reports about the defendant's character and hearsay evidence of defendant's prior criminal activity which had not resulted in a charge or conviction. In the almost 30 years since *Williams*, courts have applied its holding to permit sentencing judges to consider such matters as arrests, pending indictments, dismissed charges, charges reversed on appeal, and charges resulting in acquittal (Petitioner's Brief 16).

The wide discretion which a sentencing judge possesses both as to the length of sentence and the factors which may be considered in arriving at that sentence have lead to the general proposition that sentences within statutory limits are normally unreviewable. *Gore v. United States*, 357 U.S. 386, 393 (1958). However, recent extensions of procedural rights and evidentiary restrictions to post adjudication proceedings[3] have lead several courts to

[3] *See, e.g.*, Mempa v. Rhay, 389 U.S. 128 (1967) (counsel must be afforded at sentencing even when sentence imposed at probation revocation hearing); Morrissey v. Brewer, 408 U.S. 471 (1972) (due process requires preliminary and final parole revocation hearings); Gagnon v. Scarpelli, 411 U.S. 778 (1973), (due process requires preliminary and final probation revocation hearings).

develop exceptions to the general rule of non-reviewability. Where abuses are evident, either in the manner of sentencing or in the factors considered by a sentencing judge, courts are no longer reluctant to review and set aside such sentences on due process grounds. Thus, in *United States v. Tucker*, 404 U.S. 443 (1972), this Court remanded a case for resentencing where it appeared that the sentencing judge had considered defendant's convictions later determined unconstitutional because of the absence of counsel, even though the defendant confirmed the criminal activity underlying the convictions. In *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972), the court of appeals held that conclusions concerning a defendant's prior criminal activity, based upon unsubstantiated reports of an informer, were not of sufficient reliability to be properly considered by the sentencing judge. A variety of other abuses have also lead courts to vacate sentences or disapprove of the sentencing judge's practices on due process grounds.[4]

[4]United States v. Cavazos, 530 F. 2d 4 (5th Cir. 1976) (sentence vacated where a judge imposed maximum sentence on a narcotics dealer with no prior conviction on basis of FBI statistics that narcotics dealers often commit many crimes before initial apprehension); United States v. Dinapoli, 519 F. 2d 104 (6th Cir. 1975) (failure to secure presentence support constituted failure to properly exercise discretion); Woolsey v. United States, 478 F. 2d 139 (8th Cir. 1973) (en banc) (mechanical imposition of maximum sentence in conscientious objector case not within informed or sound discretion of trial judge); McGee v. United States, 462 F. 2d 243 (2d Cir. 1972) (when concurrent sentences imposed and conviction under one count later found unconstitutional, sentencing judge should reduce sentence on remaining counts or give summary explanation for failure to do so); Verdugo v. United States, 402 F. 2d 599 (9th Cir. 1968), *cert. denied*, 411 U.S. 984 (1973) (unconstitutionally obtained evidence may not be considered by sentencing judge).

Additionally, otherwise valid sentences or valid considerations by the sentencing judge have been held improper where the sentence or the factors considered conflict with or "chill" the exercise of a defendant's constitutional rights. Even though a defendant's contrition may be relevant to his need for rehabilitation, a sentencing judge may not impose an increased sentence because the defendant refuses to waive his 5th Amendment rights and admit his guilt after being convicted.[5] A majority of the circuit courts has also concluded that in arriving at the appropriate sentence a judge may not consider a defendant's not guilty plea since to do so would affect the right of every defendant to plead not guilty and have his guilt determined at trial.[6]

Against a historical backdrop of wide discretion on the part of the sentencing judge, and in light of the emerging doctrine that sentences will be more carefully reviewed for the purpose of discovering and delineating abuses of this discretion, must be viewed the several cases which have considered the issue presented by this case. In *Peterson v. United States*, 246 F. 118

[5]See, e.g., Poteet v. Fauver, 517 F. 2d 396 (3d Cir. 1975); Leblanc v. United States, 391 F. 2d 916 (1st Cir.); Thomas v. United States, 368 F.2d 941 (5th Cir. 1966).

[6]See, United States v. Derrick, 519 F. 2d 1 (6th Cir. 1975); Hess v. United States, 496 F. 2d 936 (8th Cir. 1974); United States v. Marzett, 485 F. 2d 207 (8th Cir. 1973), *cert. denied*, 415 U.S. 980; United States v. Stockwell, 472 F.2d 1186 (9th Cir. 1973); Baker v. United States, 412 F. 2d 1069 (5th Cir. 1969); Scott v. United States, 419 F. 2d 264 (D.C. Cir., 1969); United States v. Wiley, 278 F. 2d 500 (7th Cir. 1960). See also, Poteet v. Fauver, 517 F. 2d 393, 396 (3d Cir. 1975) (dicta).

(4th Cir. 1917), *cert. denied*, 246 U.S. 661 (1918), the court held that the sentencing judge, in imposing a three year sentence upon a postal employee convicted of stealing property worth forty cents, could properly take into account his belief that the defendant had suborned perjury of defense witnesses. Since that time, several other courts have held that a sentencing judge may consider his belief that the defendant committed or suborned perjury at his trial.[7] Although most of these cases are devoid of extensive analysis, the general reasons for these holdings have best been explained by Judge Frankel in *United States v. Hendrix*, 505 F.2d 1233, 1235-1237, (2d Cir. 1974). In that opinion, Judge Frankel rejected the contention that the defendant was being punished for perjury without a trial on that charge, and concentrated instead upon the practice and duty of the sentencing judge to evaluate the defendant's character with an eye towards determining his prospects for rehabilitation. After reviewing the many types of information which appellate courts have permitted sentencing judges to consider, Judge Frankel states:

> "Impressions about the individual being sentenced–the likelihood that he will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, the degree to which he does or does not deem himself at war with his society–are, for better or worse, central factors to be appraised under our theory of 'individualized sentencing.' The theory has its critics. While it lasts, however, a fact like the defendant's readiness to lie under oath before the judge who will sentence him would seem to be among the more precise and concrete of the available indicia."

Ibid. at p. 1236. In confronting the contention that this practice may "chill" a defendant's desire to testify in his defense, Judge Frankel implies that another reason for permitting a sentencing judge to consider alleged perjury on the part of the defendant is to deter other defendants from committing perjury:

> "Without denying that the point has substance, we may say that it is not wholly evil to discourage defendants from taking the stand to lie."

Ibid. at p. 1236.

Other courts,[8] and commentators,[9] have expressed the opinion that the trial judge may not consider alleged perjury committed by a defendant in fixing an appropriate sentence. The underlying rationale for this position

---

[7] United States v. Gamboa, 543 F. 2d 545, 547 (C.A. 5); United States v. Nunn, 525 F. 2d 958 (C.A. 5); United States v. Hendrix, 505 F. 2d 1233, (C.A. 2), *cert. denied*, 423 U.S. 897; Hess v. United States, 496 F. 2d 936, 939 (C.A. 8); United States v. Moore, 484 F. 2d 1284, 1287 (C.A. 4); United States v. Chuchette, 465 F. 2d 749, 754-755 (C.A. 9); United States v. Wallace, 418 F. 2d 876, 878 (C.A. 6), *cert. denied*, 397 U.S. 955; United States v. Levine, 372 F. 2d 70, 74 (C.A. 7), *cert. denied*, 388 U.S. 916; Humes v. United States, 186 F. 2d 875 (C.A. 10).

[8] In addition to the opinion below in this case, which relied upon Poteet v. Fauver, 517 F. 2d 393 (3d Cir. 1975), *see*, Scott v. United States, 419 F. 2d 264, 268-269 (D.C. Cir. 1969). See also, United States v. Moore, 484 F. 2d 1284, 1288-89 (4th Cir. 1973) (Craven, J., concurring).

[9] Note, *Discretionary Penalty Increases On the Basis of Suspected Perjury*, 1975 U. ILL. L.F. (1975); Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L. J. 204, 211-217 (1956).

is that a judge may not summarily punish a defendant for perjury in the absence of the constitutional safeguards concerning charge and trial, perjury by a defendant at his own trial does not necessarily reflect upon his need for rehabilitation, the judge may be wrong in determining that perjury had been committed, and most important, that a defendant would be discouraged from exercising his right to testify if he is subject to additional punishment because the judge felt that he had committed perjury.

For the several reasons discussed *infra*, it is Respondent's position that the sentencing judge's consideration of a defendant's alleged perjury is materially different from other legitimate sentencing considerations, and because of the actual and potential abuse caused thereby, this Court should disapprove the consideration of alleged perjury in this case, either as a matter of constitutional law or in the exercise of the Court's supervisory power over the federal courts.

A. The Commission of Perjury By a Defendant During His Trial Has No Legitimate Relationship To the Recognized Purposes of Sentencing.

As observed by the Government, a trial judge's discretion to consider various sentencing factors is at least limited to the extent that the matters considered must be reliably established and reasonably related to a recognized purpose of sentencing (Petitioner's Brief 15). The generally recognized purposes of sentencing include protection of society against the wrongdoer, punishment of

the wrongdoer, deterring the wrongdoer and others from committing similar offenses, and reformation and rehabilitation of the wrongdoer. *Williams v. New York*, 337 U.S. 241, 249, n. 13. It has been stated that there are two basis for permitting a sentencing judge to increase the sentence of a defendant believed to have committed perjury.[10] First, an additional increment of sentence may be considered punishment for the offense of perjury. Second, it may be contended that the commission of perjury reflects adversely upon the defendant's prospects for rehabilitation thereby justifying a lengthier sentence for the underlying conviction. There are two other possible basis—an increased sentence protects society from the perjurer, or deters other defendants from committing perjury. It is clear that if either punishment, protection, or deterrence underlie the increased sentence to the alleged perjurer, the defendant is in fact being incarcerated for the substantive crime of perjury which, as argued below, is improper. If the rehabilitation rationale is relied upon, then the practice is valid only if it can be shown that false testimony by a defendant at his trial is related to his prospects for rehabilitation.[11]

---

[10] Scott v. United States, 419 F. 2d 264, 268-69 (D.C. Cir. 1969); Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE, L. J. 204, 212 (1956).

[11] While it is clear that the trial judge below increased Respondent's sentence because of alleged perjury, it is not clear whether the judge did so because of his belief that Respondent therefor needed additional incarceration for rehabilitation, or whether the judge was punishing Respondent for the perjury, protecting society, or attempting to deter other defendants from committing perjury.

1. The federal offense of perjury is a subtantive crime punishable by a fine of up to $2,000.00, or imprisonment of up to five years, or both. 18 U.S.C. Section 1621. Although in some situations an acquitted defendant may successfully raise the defense of res judicata or the doctrine of collateral estoppel in a subsequent perjury prosecution, a convicted defendant has no such defenses and is subject to prosecution for perjury. *United States v. Williams*, 341 U.S. 58 (1951). Of course, one charged with perjury would be accorded the full constitutional guarantees accorded all other criminal defendants, including, but not limited to, the right to be tried by an impartial jury and the right to acquittal unless proven guilty beyond a reasonable doubt.[12] If a court were to

[12] It would not be idle speculation to suggest that Respondent would not have been convicted of perjury on the evidence submitted at his escape trial. Perjury cases alone are subject to the so-called "two witness rule", discussed in more detail later in this brief, whereby the falsity of an allegedly perjured statement must be established by testimony of two independent witnesses or one witness together with corroborating circumstances. Weiler v. United States, 323 U.S. 606 (1945). Independent corroborating evidence must be such as to be inconsistent with the innocence of the Defendant. United States v. Weiner, 479 F. 2d 923 (2d Cir. 1973). Additionally, an essential element of the crime of perjury is that the alleged false statement be "material". In order to be material, the statement must have impeded and hampered the course of the trial in the sense that it had a tendency to affect the ultimate decision of the jury. United States v. Edwards, 443 F. 2d 1286 (8th Cir. 1971). The only witness who contradicted Respondent's testimony concerning duress was the inmate witness, Alex "Sarge" Barnes. Based upon the testimony of the two FBI officers, perhaps a jury would have been justified in determining that Respondent lied when he testified that he did not deny being Ted Grayson upon his arrest in New York City. However, *(continued)*

penalize a defendant for this substantive crime of perjury by increasing his sentence on another offense, or for that matter, if the court were to increase the defendant's sentence for the purpose of deterring other defendants from committing perjury, then one of the basic tenets of the criminal law would have been violated. The summary adjudication by a court of a defendant's guilt, and an increment of sentence imposed therefor, is certainly an inadequate substitute for the constitutional safeguards and other rights which a person charged with perjury would normally have.

It is little wonder, then, that proponents of the position supporting the right of a sentencing judge to consider alleged perjury reject any contention that an additional increment of sentence is punishment for the perjury, but rather maintain that the perjury is a reflection of the character of the defendant and his prospects for rehabilitation.[13] However, unlike other facts which a sentencing judge might consider, perjury of the defendant is a specific crime occurring in the presence of the judge. The temptation to punish the defendant, or to impose an additional sentence upon him for the purpose of deterring other would-be perjurers, is understandably

(footnote continued from preceding page)
this statement could hardly be considered as having any appreciable effect upon the ultimate decision of the jury. On the other hand, there was sufficient evidence to have convicted witness Barnes of perjury since two independent witnesses, Respondent and the other inmate witness, contradicted his denials of threatening or otherwise confronting Respondent.

[13] United States v. Nunn, *supra*, 525 F. 2d at 560-61; United States v. Hendrix, *supra*, 505 F. 2d at 1235-36; United States v. Levine, *supra*, 372 F. 2d at 74; Judge Rosenn's dissent (Pet. App. 22a).

great. As pointed out earlier in this brief, the opinion in *United States v. Hendrix, supra*, suggests that one of the benefits gained from permitting the disputed practice is that it would deter other defendants from committing perjury in their defense. The line between punishment for the substantive offense of perjury and increased punishment on the underlying offense as a result of the perjurious defendant's need for additional rehabilitation, is an obscure one, and may not be present at all.

2. The position that a sentencing judge may consider alleged perjury by a defendant to the extent that it is reflective of his character and need for rehabilitation, is premised upon the conclusion that the commission of perjury by a defendant at his own trial demonstrates a greater need for rehabilitation. However, the validity of that conclusion is open to question. As stated by the court in *Scott v. United States, supra*, 419 F.2d at 269:

> ". . . the peculiar pressures placed upon a Defendant threatened with jail and the stigma of conviction make his willingness to deny the crime an unpromising test of his prospects for rehabilitation guilty. It is indeed unlikely that many men who commit serious offenses would balk on principle from lying in their own defense. The guilty man may quite sincerely repent his crime but yet, driven by the urge to remain free, may protest his innocence in a court of law. This realization, indeed, unquestionably accounts for the extreme infrequency with which convicted criminals are in fact prosecuted for perjury committed at their trials."

Long held notions concerning the predictive effect of a defendant's actions in the course of judicial proceedings

on the rehabilitative prospects of the defendant are subject to serious dispute in light of modern day criminal practice and procedure. For example, the American Bar Association, *Standards Relating to Pleas of Guilty*, Section 1.8(a)(ii) (Approved Draft 1968), sanctions sentence concessions to defendants who enter a plea of guilty because "the defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct."[14] However, the widespread and perhaps necessary practice of plea bargaining has radically altered the criminal justice model as known in less hectic times. Few defendants have the opportunity to participate in the plea bargaining system and this, coupled with the almost universal knowledge that a defendant who bargains for his plea will usually receive a lighter sentence, negates the self-determination value previously ascribed to guilty pleas.[15] Rather than demonstrating repentance

---

[14] A survey of federal judges conducted in the mid 1950's indicates that a majority of the 140 judges who cooperated with the survey feel that a defendant's guilty plea is a relevant factor in the sentencing procedure and that a defendant pleading guilty normally receives a more lenient punishment than a defendant who pleads not guilty.

> "The predominant basis for a court's considering a defendant pleading guilty less culpable than one denying guilt is the belief that a guilty plea demonstrates the readiness of the accused to accept responsibility for his criminal acts. Judges feel that such a confession of wrongdoing evinces a repentant attitude, and thus represents an important step toward rehabilitation of the accused."

Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE, L. J. 204, 205-06 (1956).

[15] See generally, Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 Harv. L. Rev. 564 (1977).

and a willingness to assume responsibility for his actions, it is far more likely that a defendant pleading guilty does so out of expediency and a desire to avoid a harsher penalty.

Similarly, a defendant who elects to plead not guilty and exercise his right not to testify, probably does so not because of scruples against perjury, but because he feels his best chance of acquittal is a failure of proof beyond a reasonable doubt rather than risking the jury's disbelief and sure conviction. When a defendant avoids perjury out of expediency rather than principle, it is doubtful whether he is a better prospect for rehabilitation than the defendant who perjures himself in an unsuccessful effort to obtain acquittal. The action of a defendant subjected to the pressures of a criminal charge and judicial proceedings is not an accurate gauge for determining his prospects for rehabilitation.

B. Alleged Perjury By a Defendant and the Determination of Its Existence, is Inherently Different From Other Sentencing Considerations.

Williams v. New York, supra, and its progeny, establish that under our theory of individualized sentencing a judge may consider, without the burden of due process requirements, various character traits in selecting the appropriate sentence for a convicted defendant. These character traits include prior criminal activity in the form of prior convictions or prior criminal conduct not resulting in conviction, as well as non-criminal status or behavior such as general character, age, health, family

situation, past life and habits (Petitioner's Brief at 16–17). Even if we were to assume that the commission of perjury by a defendant at his trial is relevant to an evaluation of his prospects of rehabilitation, such perjury, being a distinct crime presumably committed shortly before sentencing, is properly punishable in a separate criminal proceeding. Thus, perjury as a sentencing factor is significantly different from the other sentencing factors. The defendant may have a history of irresponsible behavior or other undesirable character attributes which, though not subject to separate criminal proceedings, are nevertheless relevant in selecting an appropriate sentence. Similarly, past criminal conduct as it reflects upon the present character of a defendant is subject to no alternative legal sanctions either because such conduct has already been the subject of a criminal proceeding or because the passage of time renders criminal proceedings thereon impractical or illegal. Because perjury as a sentencing factor is practically the only sentencing factor[16] for which alternative legal

[16] It may be argued that heretofore valid sentencing factors such as pending indictments and recent uncharged criminal acts may also be subject to separate criminal proceedings and that the propositions set forth herein cannot stand without disapproving the decisions which sanction the consideration of this type of criminal conduct. However, there is another and perhaps more important distinction between perjury and *all* other sentencing criteria which is not discussed here because it is the subject of the next section of this brief. That is, only the consideration of perjury in the determination of an appropriate sentence acts to "chill" the right of defendants to testify in their own trial. While this Court may not find that the sentencing judge's consideration of alleged perjury chills a defendant's right to testify to an unconstitutional extent, it can hardly be denied that some chilling effect exists. Thus, a court may consider sentencing factors such as

(continued)

sanctions are available, judges should determine any additional time necessary for rehabilitation in separate proceedings which provide recognized procedural safeguards to the accused.

There is another significant difference between perjury and other sentencing factors related to a defendant's need for rehabilitation. Perjury is the only such factor the existence of which is determined by the trial judge. In the ordinary sentencing proceedings, a judge considers a variety of facts concerning prior criminal conduct and general character attributes the existence of which have been determined by probation agents specifically trained to gather the necessary information and prepare presentence reports. Fed. R. Crim. P. 32(c)(2). From this information, the judge may consider a number of imprecise factors in an effort to determine a defendant's character and concomitant rehabilitative needs. However, the existence of perjury by the defendant is based upon an

---

(footnote continued from preceding page)
untried indictments and recent uncharged criminal acts despite the existence of alternative criminal proceedings because the consideration of these factors have no affect upon the rights of the defendant at the instant trial. The same cannot be said for consideration of alleged perjury in determining an appropriate sentence.

isolated factual determination[17] by the judge. Because the pressures of a trial may require the judge to compare the defendant's testimony with that of cunning witnesses who concoct credible fabrications, there is a danger in permitting the judge to rely on his personal impressions. In simple terms, a judge should not impose additional punishment because of his belief that the defendant lied in his own defense since the judge may very well be wrong. See, *United States v. Moore*, 484 F.2d 1284, 1288 (4th Cir. 1973) (Craven, J. concurring).

Perjury is particularly difficult to determine and thus is subject to the so-called "two witness rule" which requires false testimony to be proven by two independent witnesses, or by one witness and corroborative evidence.

---

[17] To this extent, the situation is similar to that in Specht v. Patterson, 386 U.S. 605 (1967) where this Court refused to permit judicial consideration of a potential sentencing factor. The case involved a state sex offender statute permitting the trial court to give a defendant convicted of a sex-related crime an indeterminate sentence from one day to life if the judge found that the defendant was a threat to members of the public or an habitual offender and mentally ill. The court declined to apply the principles of Williams v. New York, *supra*, to this situation and required that the necessary findings be accompanied by due process safeguards. While the holding in this case appears to have been grounded upon the fact that the state sex offender statute did not make the commission of the specified crime the basis for sentencing, also important was the fact that the necessary findings under the statute were new and separate findings not related to the offense charged. To the extent that *Specht* requires due process safeguards where a distinct and separate issue is involved, the argument may be made that a determination that a defendant committed perjury at trial is such a distinct and separate issue requiring due process safeguards not presently conferred in the federal sentencing procedure.

The "two witness rule" is firmly established as part of the federal law on perjury. *Weiler v. United States*, 323 U.S. 606 (1945). The necessity for this rule may come from the belief that an honest witness needs protection from "hasty and spiteful retaliation in the form of unfounded perjury prosecutions," or from the belief that equally honest witnesses may well have differing recollections of the same event and therefore, perjury ought not to rest entirely upon an oath against an oath. *Ibid.* at 550. Since the special proof requirements for perjury are based upon the inherent danger of permitting a finding of perjury in the absence of these requirements, it is unreasonable to permit a sentencing judge to consider his belief that the defendant committed perjury where that belief is unlikely to be based upon impressions or suppositions only.

It has been argued above that among various factors which might be considered in determining an appropriate sentence, only perjury of the defendant is subject to alternative criminal procedures and sanctions, and that perjury is a difficult crime to prove yet it is the only sentencing factor which must be established by the judge. Because of these propositions, Respondent asks this Court to prohibit sentencing judges from summarily increasing the would-be sentence of a defendant suspected of committing perjury, whether that increase is based upon the need for punishment or the need for greater rehabilitation. Probably because of these two propositions, the power of a judge to impose summary punishment for perjury has been restricted in another situation. Lying under oath in a judicial proceeding may at times be punishable as criminal contempt.[18] It would

[18] Note, *Falsification as Contempt*, 7 VAND. L. REV. 272 (1954).

appear that an intentional lie as to a material fact would be an obstruction of justice. However, it has been held that perjury alone is not punishable by summary contempt proceedings. *In re Oliver*, 333 U.S. 257 (1948).

> "If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires . . . that the accused be accorded notice and a fair hearing . . ."

Ibid. at 509. The rigid requirements set for perjury to qualify as criminal contempt reflect the policy that punishment for perjury should rarely be imposed in the absence of normal due process safeguards. If a sentencing judge increases a defendant's sentence because of alleged perjury at trial, the judge is doing indirectly what he cannot do directly, and in the process, is depriving a defendant of his right to appeal.[19]

Appellate courts have always been concerned with the veracity of facts considered by a judge in the sentencing process.[20] The substantial difficulty of accurately determining the existence of perjury in a trial where perjury has not been charged, particularly since alternate criminal procedures are available, distinguishes this factor from other legitimate sentencing factors and militates against its use in cases such as the one at bar.

[19] See Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L. J. 204, 213-215 (1956).

[20] United States v. Tucker, 404 U.S. 443 (1972); Townsend v. Burke, 334 U.S. 736 (1948); United States v. Weston, 448 F. 2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 106 (1972).

C. The Threat of An Increased Sentence Based Upon the Trial Judge's Belief that the Defendant Committed Perjury During His Trial, Unconstitutionally "Chills" the Exercise of the Defendant's Right to Testify in His Own Behalf.

It is clear that a defendant in a federal criminal proceeding has a statutory right to testify in his own behalf,[21] and perhaps a constitutional right to do so.[22] To permit a sentencing judge to summarily increase a convicted defendant's sentence because of the belief that the defendant committed perjury would needlessly discourage many defendants from testifying in their own behalf at trial. As stated by Judge Craven of the 4th Circuit Court of Appeals:

> "I am very strongly of the opinion that a trial judge may not properly impose a harsher sentence upon a defendant because he thinks the defendant lied on the witness stand. Such a practice will inevitably chill and hamper, if not ultimately destroy, the right to testify in one's own defense. It seems to me unconscionable that a defendant must run the risk of conviction of the offense charge and at the same time run the gauntlet of disbelief."[23]

Not infrequently, courts are requested to review a situation where it is contended that a particular aspect

---

[21] 18 U.S.C. Section 3481.

[22] *See*, Brooks v. Tennessee, 406 U.S. 605, 612 (1972); United States ex rel. Wilcox v. Johnson, 555 F. 2d 115 (3d Cir. 1977).

[23] United States v. Moore, *supra*, 384 F. 2d at 1288. See also Scott v. United States, *supra*, at 269.

of the criminal process "chills" the exercise of some constitutional or statutory right of the defendant, or where that aspect of the criminal process requires the defendant to choose between two or more rights. The varying circumstances of each case have lead to varying rules.[24] While counsel admits to some confusion as to whether in fact there is a particular "rule" covering Respondent's contention on this issue, it would appear that determinations are in fact made on a case-by-case basis.[25] A review of the recent cases would indicate that the legitimacy of and policy behind the particular aspect of the criminal process complained of must be weighed against the extent to which the complained of practice actually chills the particular right of the defendant. The ultimate issue is whether the complained of practice places an impermissible burden on the right of the defendant, or whether the practice merely requires the making of a difficult choice which is an inherent part of our legal system.[26]

The reasons behind and the legitimacy of permitting the sentencing judge to consider his belief that the defendant lied at trial has previously been discussed in this

---

[24] *Compare, e.g.*, United States v. Jackson, 390 U.S. 570 (1968), (practice complained of needlessly encouraged waivers of constitutional rights) *with* Parker v. North Carolina, 397 U.S. 700 (1970) (defendant voluntarily waived rights), *and* Crampton v. Ohio, 402 U.S. 183, 217 (1971) (compelling election does not impair to an appreciable extent any of the policies behind the rights involved).

[25] Chaffin v. Stynchcombe, 412 U.S. 17, 32 (1973).

[26] See, Crampton v. Ohio, *supra*, 402 U.S. at 213; Chaffin v. Stynchcombe, *supra*, 412 U.S. at 32-35.

brief. Respondent reasserts that there is substantial doubt as to whether the practice has relevance to any legitimate sentencing goal and even if such relevance is found, it is doubtful whether a sentencing judge should be permitted to summarily determine that a defendant committed perjury in light of the fact that it is extremely difficult to determine accurately the existence of perjury and in light of the fact that alternative criminal procedures are readily available. Because of the doubtful validity of the practice in the first place, it is submitted that very little in the way of "chilling effect" need be demonstrated in order to conclude that the practice here in issue places an impermissible burden on the right of a defendant to testify in his own behalf.

If fact, the burden is a substantial one. Petitioner argues that it is unlikely that a defendant would forego presenting truthful testimony because of the risk of receiving an increased sentence. However, there are strong indications that sentence enhancement for alleged perjury is a common practice. The number of cases on this point decided by federal circuit courts of appeal probably represent only a fraction of the instances where the sentencing judge stated his reasons for the sentence enhancement, or where the record otherwise indicated the probable reasons. One survey of federal trial judges revealed that over 20% of the judges responding to the survey relied upon suspected perjury as a basis for more severe punishment of a defendant convicted at trial, some of those judges apparently presuming the occurrence of perjury from the mere fact of conviction.[27]

[27] Note, *The Influence of Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L. J. 204, 211-212 (1956).

This widespread practice, if known, would naturally cause a truthful defendant to at least consider the possible consequences of his taking the stand. And where the defense or testimony is in the slightest manner unusual, or where the testimony will be contradicted by testimony of apparently more credible prosecution witnesses, a decision to avoid the risk by not testifying would be a sound and practical one. Nor is the choice merely between testifying and not testifying. The plea bargaining system widely employed in this country, by itself, tends to encourage innocent defendants to plead guilty in order to receive a less severe sentence.[28] An innocent defendant who is considering whether to go to trial or negotiate a plea would in all probability choose the later alternative if he concludes that his defense or testimony will be open to question and that he therefore, risks the judge's disbelief and even greater sentence.

The choice required to be made by a defendant as a result of the practice here in issue is not just another difficult judgment routinely faced by criminal defendants and their attorneys. *Crampton v. Ohio*, 402 U.S.183, 215 (1971). Petitioner compares the risk of an enhanced sentence because of alleged perjury with other risks faced by a defendant who chooses to testify, such as the possibility of a perjury prosecution, searching cross-examination, or impeachment with prior convictions. (Petitioners Brief 26-27). However, these are substantially different risks. Searching cross-examination and impeachment by prior convictions is an inherent part of the fact finding basis of jury trials. The risks go only

[28] See, Note, *The Influence of Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L. J. 204, 211-212 (1956).

to whether or not the defendant will be found guilty by the jury. On the other hand, when the defendant is subjected to an increased sentence because the judge believed he lied, the defendant's choice becomes substantially more difficult. The risk involved has nothing to do with the determination of guilt by twelve jurors, but rather goes to the severity of the sentence which he will receive if convicted. An innocent defendant should not have to make this choice. The risk of a perjury prosecution is not nearly as worrisome because at least the defendant would be afforded due process in defending himself, quite different from the risk of summary punishment by a single judge who happens to disbelieve him.

Perhaps the case most closely analogous to the one at bar is *Brooks v. Tennessee*, 406 U.S. 605 (1972). That case involved the constitutionality of a Tennessee statute which required a criminal defendant desirous of testifying to do so before any other testimony for the defense was presented. The court held that this statute impermissibly burdened a defendant's right to remain silent, and inferentially, to take the stand, because the defendant was required to make his choice before he had a chance to evaluate the strength of his defense. The Tennessee statute had an admittedly legitimate purpose of discouraging testimonial influence by decreasing the risk that a defendant would color his testimony to conform with other testimony presented in his defense. But the possibility of a defendant committing perjury was held not to outweigh the defendant's unrestricted right of choosing whether and when to testify. It is submitted that the legitimacy of and purpose behind the Tennessee statute are more obvious than are the legitimacy and purpose of permitting a sentencing judge to consider his

belief that a defendant lied at trial. Furthermore, the chilling effect of the statute upon a defendant's right to remain silent or testify was certainly no greater than the chilling effect upon a defendant's right to testify caused by the practice here in issue. Nevertheless, the choice which the statute compelled a defendant to make was apparently not one of those routinely difficult judgments inherent in the criminal process as had been found in the earlier case of *Crampton v. Ohio, supra*. The conclusion that an impermissible chilling effect is created when a judge is permitted to enhance a sentence because of suspected perjury is more compelling than the situation presented in *Brooks v. Tennessee*.

D. If This Court Should Conclude That It Is Not Constitutionally Impermissible For a Sentencing Judge To Consider His Belief That a Defendant Lied at Trial, Then in the Exercise of the Court's Supervisory Power it Should Prohibit or Otherwise Restrict This Practice in Federal Criminal Cases.

In discussing various aspects of the issue in this case, the factual background of the case may have been forgotten or stressed too little. Despite the trial judge's belief that his defense was a "complete fabrication", Respondent strenuously denies that he committed perjury in testifying at his trial. A reading of the trial transcript will indicate that this is not a case of obvious false testimony, and at best, the trial judge's belief was a matter of opinion. Furthermore, in light of the court's charge to the jury, it is evident that the Respondent's testimony was not necessarily inconsistent with

the finding of guilt since the jury could have determined that Respondent should have sought the protective custody of the officials at the Allenwood Prison Camp or that he should have turned himself in immediately upon leaving the Camp.

Respondent's arguments thus far presented have been directed towards the unconstitutionality of the sentence imposed upon him. However, in order to affirm the decision of the court below, it is not necessary to conclude that the trial judge's consideration of perjury as a sentencing factor was unconstitutional. Ever since *McNabb v. United States*, 318 U.S. 322 (1943), it has been recognized that in exercising its supervisory power over federal courts, this Court is not bound by the minimal historic safeguards set forth in the Constitution. Rather, the court's supervisory power has been used to effect significant reforms in the federal judicial practice which were not mandated by the Constitution. In addition to formulating rules of general applicability to federal courts,[29] the Court has exercised its supervisory powers to do justice in a particular fact situation.[30]

Since reasonable men may disagree, particuarly on constitutional issues, it is recognized that the Court may not concur with Respondent's position that the practice here in issue was unconstitutional. However, regardless of constitutionality, it is submitted that the points heretofore raised indicate that the desirability of permitting

[29] See, e.g., Jencks v. United States, 353 U.S. 657 (1957); Communist Party v. Subversive Activities Control Board, 351 U.S. 115 (1956).

[30] Marshall v. United States, 360 U.S. 310 (1959); Grunewald v. United States, 353 U.S. 391 (1957).

federal judges to increase sentences because of a defendant's alleged perjury is very doubtful. Therefore, Respondent requests the Court to exercise its supervisory powers and prohibit this practice in federal criminal trials.

Alternatively, Respondent requests the Court to exercise its supervisory powers and establish safeguards which would adequately prevent the abuses demonstrated by the facts of this case. Several courts and judges rendering decisions contrary to the position of Respondent here, have nevertheless suggested some controls. For example, in *United States v. Moore, supra*, 484 F.2d at 1288, the majority opinion states:

> It is better in the usual case for the trial judge who suspects perjury to request an investigation. Then, if the facts warrant it, the United States Attorney may institute prosecution for this separate and distinct crime."

In *United States v. Hendrix, supra*, 505 F.2d at 1236-37, the Second Circuit Court of Appeals held that perjury should not be treated as an adverse sentencing factor unless the judge is persuaded beyond a reasonable doubt that the defendant committed it. The court also noted that:

> "This was a case where the jury could not have convicted without being persuaded beyond a reasonable doubt that the appellant had lied, deliberately and willfully. The trial judge concurred in that unanimous persuasion."

Judge Rosenn, dissenting in the court below, would limit a judge's discretion to consider alleged perjury to situations where the judge was convinced beyond a reasonable doubt that the defendant intentionally lied on material

issues of fact and where the falsity of the defendant's testimony is necessarily established by the finding of guilt. (Pet. App. 30a-31a).

It is suggested that Judge Rosenn's proposed safeguards are the minimum which should be established in an attempt to alleviate the many problems connected with using suspected perjury as a sentencing factor. As pointed out earlier in this Brief, one of the chief problems with the practice is that the judge can summarily conclude that a defendant has committed perjury. Therefore, any safeguards adopted by this Court should include a prohibition against considering perjury as a sentencing factor unless the falsity of the defendant's testimony is necessarily established by the finding of guilt. At least under these circumstances, the finding of false testimony would be based upon the conclusions of twelve individuals rather than upon the conclusions of the judge alone. Since, in the case at bar Respondent's testimony was not inconsistent with the guilty verdict, the case should be remanded for resentencing without consideration of the alleged perjury.

CONCLUSION

The judgment of the court of appeals should be affirmed and the case should be remanded to the district court for resentencing without consideration of Respondent's alleged false testimony given at trial.

Respectfully submitted,

JOHN M. HUMPHREY
23 West Third Street
Williamsport, PA 17701

Attorney for Respondent
Ted R. Grayson

FOR ARGUMENT

Supreme Court, U.S.
FILED
FEB 9 1978
MICHAEL RODAK, JR., CLERK

No. 76-1572

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

TED R. GRAYSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1572

UNITED STATES OF AMERICA, PETITIONER

v.

TED R. GRAYSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent concedes (Br. 11) that, in imposing sentence upon a convicted defendant, a federal trial judge properly "can take into account information concerning the defendant's life, health, habits, conduct, and mental and moral propensities, including hearsay reports about the defendant's character and hearsay evidence of defendant's prior criminal activity which had not resulted in a charge or conviction," such as evidence of "arrests, pending indictments, dismissed charges, charges reversed on appeal, and charges resulting in acquittal * * *." Respondent argues, however, that a defendant's decision to present false testimony at trial is inherently different from these other sentencing factors and that its consideration in sentencing would unconstitutionally "chill" the exercise of a defendant's right to testify in his own behalf. We submit that none of the reasons offered by respondent supports these contentions.

1. In attempting to distinguish false trial testimony from other conduct bearing upon the character of a convicted defendant, respondent relies (Br. 17-19) upon the fact that perjury is a crime for which alternative legal sanctions are available. The same could of course be said of a defendant's prior arrests or convictions, consideration of which has always been thought legitimate in imposing sentence. But a more significant flaw in respondent's argument is that it misperceives the purpose for which a sentencing judge considers a defendant's false trial testimony, which is *not* to add a separate punishment for perjury, but rather to assist in determining the defendant's need for, and prospects of, rehabilitation and hence in fixing the appropriate punishment for the crime for which the defendant has been convicted. Thus, if the commission of perjury were not a crime, but merely a morally reprehensible act, the government would urge just as strongly that a sentencing judge could properly take the factor into account, yet in such circumstances respondent's objections would be inapposite. It would make little sense, however, to exclude bad acts shedding significant light on a defendant's character from the sentencing determination simply because those acts are sufficiently serious to justify the imposition of criminal sanctions.

2. Respondent suggests (Br. 19-21) that false testimony by a defendant at his own trial is irrelevant to a proper sentencing determination. It may be that, as respondent speculates (Br. 20), some defendants commit perjury out of an understandable desire to preserve their liberty rather than as a result of a pervasive character defect, and that many other defendants choose not to testify at trial, to testify truthfully, or to plead guilty out of expediency rather than repentence. It hardly follows from this premise, however, that a defendant's decision to lie under

oath invariably lacks probative value with respect to any recognized goal of sentencing. If nothing else, a defendant's willingness to commit perjury reflects a belief that the accepted norms of society are subordinate to his own self-interest. Respondent's argument is more appropriately directed toward the weight that the trial judge should give to the defendant's perjury in a particular case, not to whether he may consider it at all.

3. Respondent's allegation (Br. 24) that "[p]erjury is the only [sentencing] factor the existence of which is determined by the trial judge" alone also is not accurate. A judge obviously does not make the determination whether perjury has occurred in a vacuum, but rather relies upon the contradictory evidence offered by other witnesses. Moreover, the jury's verdict of guilty is generally a reliable indication that it too viewed the defendant's exculpatory testimony as unworthy of belief.[1] Perhaps more important, trial judges frequently consider other, unquestionably legitimate, factors in sentencing, such as the relative culpability of co-defendants, that are based solely upon their personal assessment of the evidence adduced at trial. Finally, even were petitioner's premise correct, he suggests no reason why a trial judge should be prohibited from taking his own factual conclusions into account in fixing a suitable sentence but should be permitted to consider the conclusions of others,

---

[1]Although respondent asserts that the jury's verdict in this case was not inconsistent with his trial testimony, Judge Rosenn, after a review of the trial record, concluded that "the falsity of [respondent's] testimony [was] necessarily established by the finding of guilt" (Pet. App. 31a). This conclusion was not disputed by Judges Garth or Adams.

as detailed, often in cursory fashion, in the presentence report.[2] A defendant's prior arrests, after all, may represent nothing more than a single police officer's determination that there was probable cause to believe that the defendant had committed a crime. Having presided over the entire trial and having observed firsthand the defendant's demeanor while on the witness stand, the sentencing judge is in an excellent position to determine whether the defendant knowingly gave false testimony, and there is no justification for indulging a presumption that such determinations will frequently be suspect.[3]

4. Respondent argues (Br. 28-33) that a trial judge's consideration of perjury as a sentencing factor would

---

[2]Respondent's reliance (Br. 25 n. 17) upon *Specht* v. *Patterson*, 386 U.S. 605, is misplaced. In *Specht*, this Court extended due process safeguards to a Colorado procedure under which a defendant, after having been convicted of a specified sex offense, could be subjected to substantial additional imprisonment if the sentencing judge found him to be a threat to the public or to be a habitual offender and mentally ill. Thus, the Colorado statute made the commission of one crime "the basis for commencing another proceeding under another Act" (386 U.S. at 608), a proceeding that could lead to punishment beyond that authorized for the crime of which the jury had found the defendant guilty. Here, the court had no power to impose upon respondent punishment greater than that authorized for the crime of prison escape. *Specht*, in which the Court expressly "adhere[d] to *Williams* v. *New York* [337 U.S. 241]" (386 U.S. at 608), thus was concerned solely with a defendant's right to due process in sentencing, not with the types of information that a trial judge may properly take into account. Respondent does not contend that he was denied any required procedural protections during his sentencing proceeding.

[3]Respondent's repeated assertion (Br. 18 n. 12, 25) that the "two witness" rule demonstrates Congress' recognition of the difficulty of proving perjury overlooks 18 U.S.C. 1623, which eliminates the rule in prosecutions for perjury before courts or grand juries. See, *e.g.*, *United States* v. *Isaacs*, 493 F. 2d 1124, 1155-1156 (C.A. 7), certiorari denied, 417 U.S. 976.

"chill" the exercise by criminal defendants of their right to testify in their own behalf.[4] We have addressed this quite unrealistic contention in our opening brief (at pp. 23-28) and will not repeat those arguments here. We note, however, that *respondent* was not deterred from taking the witness stand in his own defense, despite his acknowledged awareness (Br. 30) that trial judges often consider a defendant's false trial testimony in sentencing. There is, in addition, not a shred of empirical data to prove that defendants have chosen not to testify out of fear that their truthful testimony would be viewed by the trial judge as perjurious and would result in a harsher sentence in the event of a conviction.

5. Finally, there is no merit to respondent's suggestion (Br. 31-34) that this Court should affirm the decision below as an exercise of its supervisory powers over the lower federal courts. This Court has frequently acknowledged that the power of the judiciary to formulate and apply rules of procedure and evidence "exists only in the absence of a relevant Act of Congress" (*Palermo* v.

---

[4]Contrary to respondent's assertion (Br. 32-33), *Brooks* v. *Tennessee*, 406 U.S. 605, is not "closely analogous" to this case. There, a Tennessee statute compelled criminal defendants to decide whether to testify before any other defense evidence had been admitted. The Court held that this requirement placed an impermissible restriction on the defendant's right to testify because it deprived him of the opportunity to assess whether the need for his own testimony justified the risks involved in taking the stand. 406 U.S. at 609-610. By contrast, a rule allowing the sentencing judge to take a defendant's false testimony into account at sentencing would place no restriction upon the exercise of the defendant's determination whether to testify, but rather would merely subject the defendant to one of the risks of taking the witness stand that prompted this Court's decision in *Brooks*.

United States, 360 U.S. 343, 353 n. 11),[5] and Congress has expressly provided in 18 U.S.C. 3577 that:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

Thus, the sole issue presented is whether there is any constitutional bar to a trial judge's decision, in an appropriate case, to take into account a defendant's willingness to lie under oath in an effort to escape criminal liability as one factor in his individualized sentencing determination. In light of the diverse factors that respondent concedes that a sentencing judge may consider, respondent's inability to distinguish perjury, and the trial judge's unchallenged finding that respondent's "defense was a complete fabrication without the slightest merit whatsoever" (App. 107), we submit that the sentence in this case did not violate respondent's constitutional rights.

For the foregoing reasons, as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed insofar as it vacated respondent's sentence and remanded the case to the district court for resentencing.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

FEBRUARY 1978.

---

[5]See also *Gordon* v. *United States*, 344 U.S. 414, 418; *Funk* v. *United States*, 290 U.S. 371, 382.